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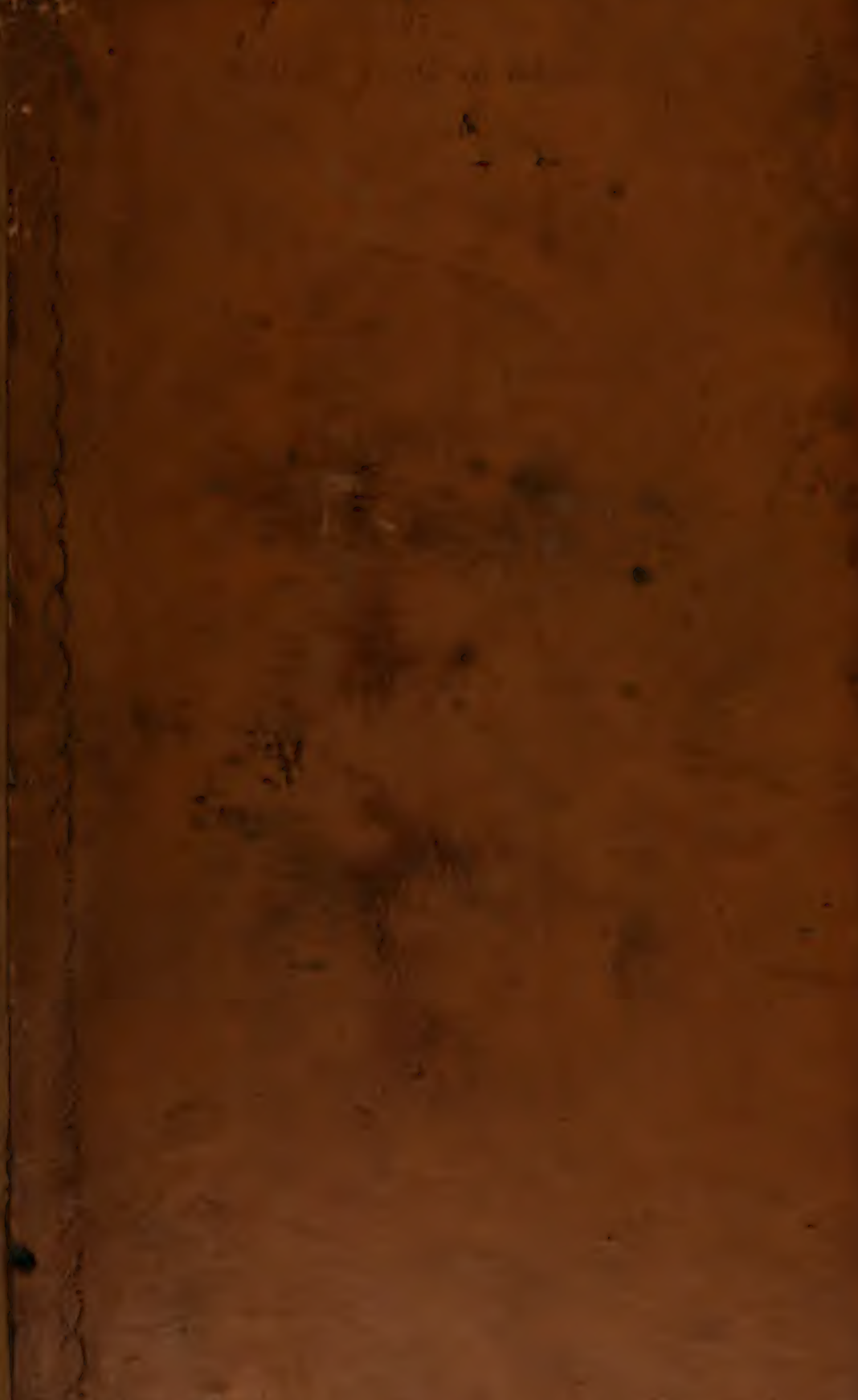
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REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Court of King's Bench,

AND UPON

WRITS OF ERROR FROM THAT COURT TO THE
EXCHEQUER CHAMBER,

IN

MICHAELMAS TERM, 1836, AND HILARY AND EASTER TERMS, 1837.

BY

SANDFORD NEVILE, ESQ.

AND

THOMAS ERSKINE PERRY, ESQ.

OF THE INNER TEMPLE, BARRISTERS AT LAW.

VOL. I.

WITH

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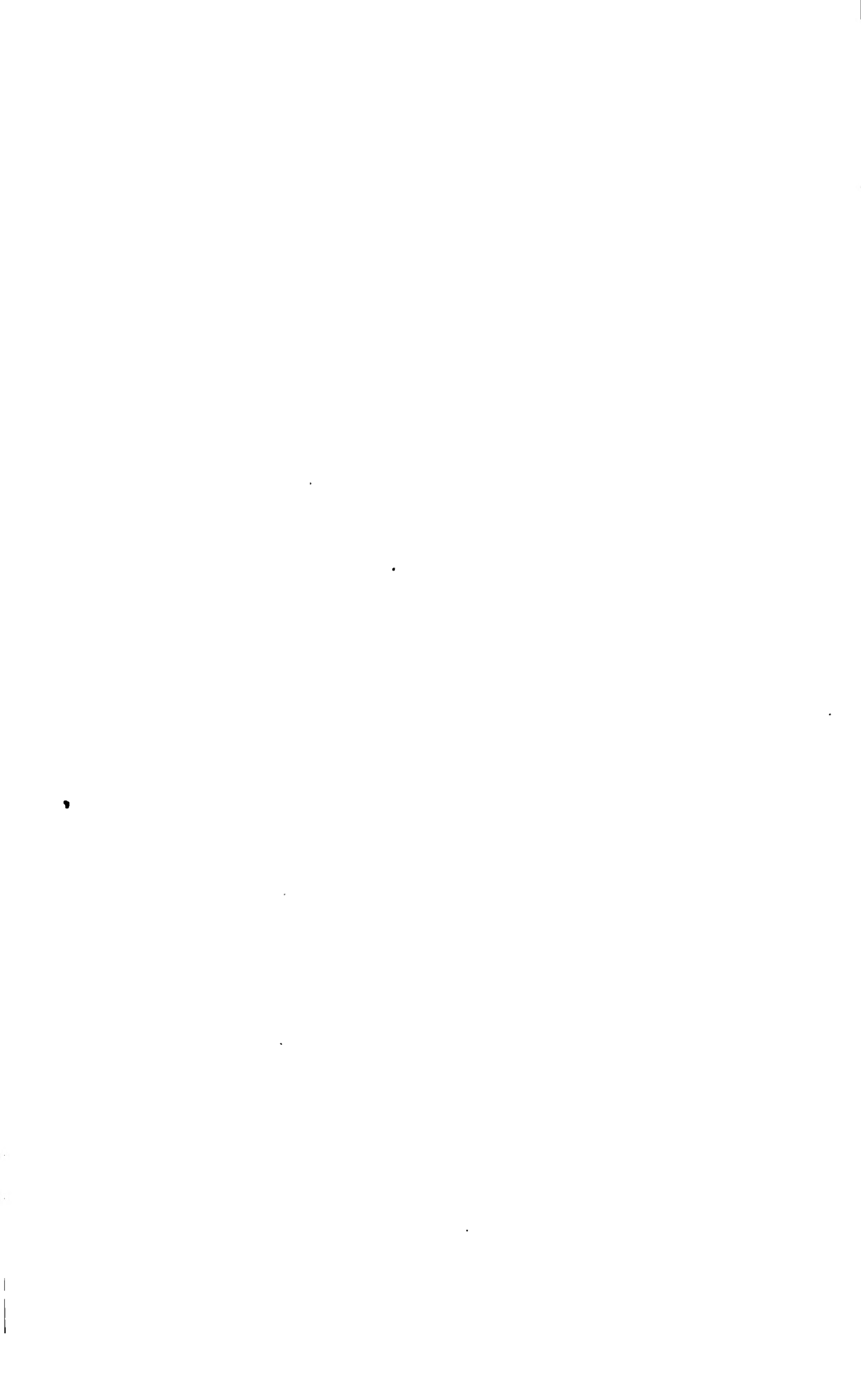


The Right Hon. THOMAS Lord DENMAN, C. J.
Sir JOSEPH LITTLEDALE, Knt.
Sir JOHN PATTESON, Knt.
Sir JOHN WILLIAMS, Knt.
Sir JOHN TAYLOR COLERIDGE, Knt.



ATTORNEY-GENERAL.
Sir JOHN CAMPBELL, Knt.

SOLICITOR-GENERAL.
Sir ROBERT MOUNSEY ROLFE, Knt.



A

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ERRATA.

In the marginal note to *The King v. The Inhabitants of Kelvedon*, p. 138, for "settlement in the pauper in A." read "settlement in the *Pauper's Father* in A."

In the Judgment of Coleridge J. in *The King v. The Poor Law Commissioners*, p. 376, line 24, for "private statute" read "prior statute."

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

MICHAELMAS TERM,

IN THE SEVENTH YEAR OF THE REIGN OF WILLIAM IV.

THE Judges in Banc this term were,
Lord DENMAN C.J. WILLIAMS J.
PATTESON J. COLERIDGE J.

1836.

In the Bail Court,
LITLEDALE J.

RULE OF COURT.

3d Nov. 1836.

IT IS ORDERED, That from and after the last day of this term all Rules upon Sheriffs, other than the Sheriffs of London and Middlesex, to return Writs of mesne or final process, and Rules to bring in the bodies of Defendants, be eight-day Rules, instead of six-day Rules.

(Signed by the fifteen Judges.)

DOE *d.* PERRY *v.* NEWTON and Wife.

Wednesday,
Nov. 2nd.

EJECTMENT for land in Cumberland. At the trial before *Coleridge J.*, at the last assizes at Carlisle, it appeared that this action was brought by the heir at law of one *Brockbank* against the defendants, who claimed as acknowledged to be genuine is already in evidence in the cause, or the disputed writing is an ancient document. These exceptions are of necessity.

Evidence of handwriting by comparison is inadmissible, except either where the writing ac-

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devisees under the will of the same individual. In February last the testator died, as was supposed, intestate. Some weeks afterwards, in removing the bed in which he had died, a document was found, which the defendants alleged to be his will. The question at the trial, was, as to the genuineness of this document. It was dated in 1833, and was witnessed by three persons, all of whom were dead at the time of the discovery of the will; and it was not known by whom it had been written. Evidence was given, on the part of the defendants, of belief in the handwriting of the testator and attesting witnesses. On cross-examination, the same persons proved that various letters produced to them by the plaintiff's counsel, and purporting to be letters written and signed by the testator and two of the persons attesting the will, were respectively in their handwriting. On the part of the plaintiff witnesses were afterwards called, who negatived, according to their belief, the alleged handwriting of the testator and attesting witnesses; and it was then proposed to give in evidence the before-mentioned letters, proved to have been undoubtedly written by the testator and witnesses respectively, in order that the jury might compare the handwriting contained in those letters with the signatures to the will, and thus detect an alleged dissimilarity between such letters and signatures. This evidence was rejected by the learned judge. A verdict was found for the defendants.

Alexander now moved for a rule nisi for a new trial, on the ground that this proof had been improperly rejected. The general rule of evidence on this subject is stated to be, that handwriting cannot be proved by a comparison of the paper in dispute with any other papers, although acknowledged to be genuine (a). The generality of the proposition was, however, limited by *Griffith v. Williams* (b). In that case the Court of Exchequer held, that the rule does not apply where the writing acknowledged to be genuine is

(a) 1 Phill. on Evidence, 490, (b) 1 Crompt. & Jerv. 47.
 7th edit.

already in evidence in the cause, and that in such case the jury may compare the two documents. Nor was this the earliest decision upon the point; for in *Allesbrook v. Roach* (a), not noticed in the last-cited case, Lord *Kenyon* allowed the signature of the defendant to several bills of exchange to be compared by the jury with his alleged signature to the bill on which that action was brought. The bills there allowed to be made the subject of comparison were no more connected with the matter in dispute than the letters proposed to be given in evidence in the present action. Nor was Lord *Kenyon's* mind unprepared for that decision, since in *Stranger v. Searle* (b) he had, only a few months previously, decided against the comparison of handwriting when made by a witness. The case of *Allesbrook v. Roach* (a), therefore, unless overruled, decides the present question. In *Solita v. Yarron* (c) Lord *Tenterden* allowed the jury to compare the disputed handwriting with other documents already in evidence for other purposes, and admitted to be the handwriting of the party. That authority, however, may be met by the observation that it does not appear that the other documents were given in evidence, as in the present instance, for the express purpose of instituting the comparison; and in support of that view of the matter *Rex v. Morgan* (d) may be cited. There *Bolland, B.*, said, that it was not his intention to decide anything more in *Griffith v. Williams* than that the jury were at liberty to compare the disputed handwriting with that of documents which were in evidence in the cause independently of that question; and he ruled the principal case accordingly. The question therefore will be, the propriety of such a limitation. Two reasons have been assigned in its support: first, that the jury may be wholly illiterate, and unable therefore to institute the comparison; the second, that the party interested has it in his power to select, and probably will select, out of a number of documents, such only as suit

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(a) 1 Esp. 351.

(c) 1 Mood. & Rob. 133.

(b) 1 Esp. 14.

(d) 1 Mood. & Rob. 134, in not.

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his purpose, and will keep back the rest. The first reason, however applicable at former times, will scarcely have any weight at the present day. The second would apply with equal stringency to cases of ancient documents, which are undoubtedly proveable by a comparison of handwriting, and yet in such cases the interested party possesses the same power of producing or keeping back any specimens he may deem favourable or otherwise to his view of the case. Such a course of proceeding is open to inquiry and observation, and affords a test, rather for the value, than for the admissibility, of this description of evidence. It is difficult to see on what solid grounds the distinction can rest between the admissibility of documents already in evidence in the cause, and those offered for the purpose of comparison. Both are avowedly in the handwriting of the party; and the question being the genuineness of the alleged writing, they afford an equal criterion.

Lord DENMAN C. J.—I think that we ought not to raise any doubt on this subject. *Griffith v. Williams* (a) was supposed to go a long way when it established the right, on the part of a jury, to take other papers, already in evidence, and compare them with the questionable one, for the purpose of coming to a conclusion, from the comparison, whether that questionable one was genuine. The real ground, on which that case stands, is, that comparison in such a case is unavoidable. When two documents are placed before a jury, one of which is in question, and the other is clearly known to be the handwriting of the party, no human power can prevent the jury from forming some opinion whether those two were written by the same person; and consequently when such is the case, and the mind of the jury must be so employed, it is better for the Court to enter into the consideration, and to direct any observations that may occur as to the value of such evidence. I own I do not find it easy to reconcile what I have now said with what passed before Lord *Kenyon* in the case of *Allesbrook*

(a) 1 Crompt. & Jerv. 47.

v. *Roach* (a). What was done in that case is not consistent with the uniform practice of Westminster Hall. *Griffith* and *Williams* (b), which was much discussed and well considered, certainly stops short of the length, to which the rule was extended in *Allesbrook* v. *Roach* (a). I do not think that case would, at the present day, receive the same decision. It is, in my opinion, infinitely safer and better to abide by the rule which has existed up to the present time, that evidence of handwriting by comparison is inadmissible, except in cases where it is unavoidable. Considering the consequences that might arise in criminal cases, that a party might be convicted on such a mere conjecture and surmise as the appearance handwriting would present, we cannot, I think, be too cautious in extending the rule; and we ought to determine that *Griffith* v. *Williams* (b) has gone as far as the doctrine on this point ought to be carried.

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PATTESON J.—I am entirely of the same opinion. I always understood that *Griffith* v. *Williams* (b) was limited, and argued as if it were to be limited, to the instance of documents already in evidence in the cause, which were necessarily therefore before the eyes of the jury. Although in the report of that case it is not, I think, expressly said that it is of necessity the jury must look at them, yet that is the principle on which the case was really decided. The jury have the documents before their eyes, and being obliged to look at them for another purpose in the case, it is impossible to prevent their forming some opinion with respect to their being like or unlike the disputed writing. This question once came before me at Gloucester, in a case tried in the Crown Court; and I recollect perfectly well the impression was strong on my mind that there was such a limitation, and I acted on it. I mention this only as shewing it is not now for the first time I have taken up the opinion I now express. I was not aware of the case before my Lord *Kenyon*. Undoubtedly that case does not seem to be reconcilable with the law which we are now laying down.

(a) 1 Esp. 351.

(b) 1 Crompt. & Jerv. 47.

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No one has greater respect for the decisions of that learned judge than I have, but I must say I think in that case he went beyond the law, and was introducing a practice which would be very dangerous if followed up.


WILLIAMS J.—Are we quite certain that the facts stated in *Allesbrook v. Roach* (a) are perfectly correct? I own I have considerable doubts on that point. If what is there laid down had unquestionably been the rule of law, and evidence of this sort had been admissible, how is it that no evidence of this sort appears ever to have been tendered on the authority of that case from that time to the present? It seems to me infinitely safer to curtail, as much as we can, the rule of evidence on this subject, rather than extend it. It would be highly dangerous to admit such evidence, as a party might select out of a great number of letters or documents the writing which he produced. The case in the Exchequer, I have no doubt, depends on the reason given by my lord and my brother *Patteson*, namely, that the comparison is unavoidable, and that it is better that such comparison should be made, subject to the direction given to the jury.

COLERIDGE J.—I am of the same opinion. I only wish to say a word with respect to that instance on which Mr. *Alexander* relied with respect to ancient handwriting. There is no doubt that, to a certain extent, it is open to the objection which Mr. Baron *Bolland* has pointed out in the note that has been read of *The King v. Morgan* (b), that is to say, that the specimens may be unfairly selected. I have always understood that to be an excepted case; but that exception has been founded on the same principle which justifies it in others. The exception is of necessity; the handwriting cannot be proved in any other way. Doubtless it is less open than modern writing would be to the objection that the selection may be an unfair one. I will add another reason why I think the evidence was properly

(a) 1 Esp. 351.

(b) 1 Mood. & Rob. 134, in not.

rejected,—that many irrelevant issues would be thereby raised. It is all very well if the jury are to look only at the documents that are otherwise in evidence in the cause. Whether those documents are or are not in the handwriting of the party, must be proved in the course of the case. If the rule is extended to documents that have nothing to do with the matter in dispute, on every one of those an issue is raised quite irrelevant to the main point; with this additional objection to be made to it, that the other party cannot know what documents are going to be produced, and does not come prepared to answer inferences arising from their production. This seems an additional reason why the rule should be narrowed, and laid down, as I have always understood it to be, by the case in the Exchequer, and as it pointedly is by Mr. Baron Bolland, in *The King v. Morgan* (a).

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 v.
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Sir *J. Campbell* A.G., amicus curiæ, mentioned that Mr. Justice *Littledale*, last Gloucester assizes, decided the same point in the same manner, after an argument of some length.

Lord DENMAN C. J.—My brother *Coleridge's* observation is a striking one. Each letter produced might raise a separate issue.

Rule refused (b).

(a) 1 Mood. & Rob. 134, in not.

(b) It would appear that a practice formerly prevailed at nisi prius similar to Lord *Kenny's* ruling in *Allesbrook v. Roach*. Thus, at the trial of the Seven Bishops, (4 St. Tr. 342,) it was admitted by their counsel, in their argument for the exclusion of certain evidence, that handwriting might be proved by comparison in civil cases. *Pemberton* Serjt. said, "Your lordship knows that in every petty cause, where it depends upon the comparison of hands, they use to bring some of the party's handwriting, which may be sworn to be the party's own hand, and then it is to be compared in court with what is endeavoured to be proved, and upon comparing them together in

court, the jury may look upon it, and see if it be right;" but he contended that such a practice did not extend to criminal cases. Perhaps much of the difficulty that occurs on this question arises from the use of the term "comparison of hands;" all evidence to handwriting, except as to what has been actually seen written, being made by comparison. *Wright* C.J. in the above trial, in answer to an objection on comparison of hands, said, "I do take it the witness himself is judge of (by) the comparison; for if he does know the party's hand, and a paper be offered to him to prove the party's hand, he is to compare it in his own mind."

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Thursday,
Nov. 3rd.

DOE *d.* ROWLANDSON and others v. WAINWRIGHT
and another.

1. It is not necessary to prove the execution of a deed if the adverse party claims under it; and this rule applies where secondary evidence is given of the deed.

2. Nor is it necessary to prove livery of seisin to a feoffment, where the adverse party claims under the feoffee.

3. It is sufficient evidence of *B.*'s claiming under a conveyance to dispense with proof of the execution of the deed by the subscribing witness, to shew that *A.*, an attorney, was in possession of the property and of the conveyance,—that he sold it to *B.*, and that upon that occasion the conveyance was handed over to *B.*

EJECTMENT for premises in Dale Street, Liverpool. The declaration contained three demises; one by *Margaret Williams*, another by *Jeremiah Williams*, and a third which it is not necessary to mention. *Wainwright* defended as landlord. At the trial before *Coleridge J.*, at the last assizes for the county of Lancaster, held at Liverpool, it appeared that the property in dispute consisted of a yard, upon which were some offices, which had been used by the defendants. The counsel for the lessor of the plaintiff opened the following case:—

9th July, 1807; a deed of feoffment between *James Rogers* of the first part, *James Oldham* of the second part, *Michael Williams* of the third part, and *Jeremiah Williams* of the fourth part, by which a piece of land, with the messuage and buildings thereon erected, which included the premises in dispute, was conveyed to *Michael* and *Jeremiah Williams*, and their heirs: To the use of *Michael* and *Jeremiah*, and the heirs and assigns of *Michael*: In trust for *Michael Williams*, his heirs and assigns.

Michael Williams shortly afterwards sold a portion of the land described in the feoffment, but not the premises in dispute, which he continued to occupy until his death in 1821. He had previously made a will, by which he devised his property to his wife *Margaret* for life, with remainders over.

Margaret continued in possession until 1827, when she was turned out of possession by a Mr. *Etches*, who had a transfer of a mortgage made by *Michael Williams*, in 1808, of a portion of the property conveyed by the feoffment, but which, it was alleged by the plaintiff, did not comprise the property in dispute.

In order to make out his case, the plaintiff called upon the defendants to produce the feoffment, and, upon their omission to do so, proved a notice to produce it, and called

a witness, who stated he was clerk to Mr. *Houghton*, an attorney, who was at one time possessed of the property in dispute,—that he sold it to *Wainwright*, and upon that occasion an abstract of the feoffment was prepared, and he handed the feoffment to *Wainwright*. The witness produced the abstract, which he said was a correct statement of the contents of the feoffment, and it was proposed to give it in evidence. This was objected to, and the witness was asked whether there was not an attesting witness to the feoffment, and whether a memorandum of livery of seisin was not indorsed on it. He answered both these questions in the affirmative. It was then objected that the abstract was inadmissible; first, because the attesting witness was not called to prove the execution; and secondly, because livery of seisin was not proved. It was answered that it was not necessary to call the attesting witness where the party claimed under the deed; and for this *Doe v. Heming* (a) was cited. The abstract was received in evidence; but after the conclusion of the trial the learned judge gave the defendant leave to move to enter a nonsuit, a verdict having been found for the plaintiff.

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Neville now moved for a rule nisi accordingly. The abstract ought not to have been received in evidence. It was not the best evidence which could have been produced. When secondary evidence is admissible, the best must be given: *Mum v. Godbold* (b). The best secondary evidence was not an abstract, but a counterpart; the next a copy; the next an abstract. Abstracts are frequently inaccurate, and are seldom prepared with care or attention, and little dependence can be placed upon them.

First point:
 An abstract
 not the best
 secondary evi-
 dence.

The subscribing witness to the deed ought to have been called. If there be one rule of evidence more clearly and distinctly laid down than another, it is, that if there be a subscribing witness to a deed not thirty years old, he must

Second point:
 The subscrib-
 ing witness
 not called.

(a) 9 Dow. & Ry. 15; S. C. 6 (b) 3 Bing. 292.
 B. & C. 28.

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&

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be called to prove its execution. Thus, in Mr. *Starkie's* Treatise on the Law of Evidence (a), it is said, "The law requires the testimony of the subscribing witness, because the parties themselves, by selecting him as the witness, have mutually agreed to rest upon his testimony in proof of the execution of the instrument and of the circumstances which then took place, and because he knows those facts which are probably unknown to others. So rigid is this rule that it is not superseded in the case of a deed by proof of any admission or acknowledgment of the execution by the party himself, whether the action be brought against the obligor himself or against his assignees after his bankruptcy; nor by proof of an admission of the execution, made by the defendant in his answer to a bill in equity." The cases warranting this position are there collected.

The answer attempted to be given to this objection was, that the defendant claimed under the deed of feoffment, and therefore it was unnecessary to prove its execution; and *Doe v. Heming* (b) was cited. The principle of that case is, that if a party by his act has recognized the validity of a deed, it is not necessary to prove its due execution. But here there was no act of recognition. The circumstances supposed to amount to a recognition were, that the defendant *Wainwright* bought the property of *Houghton*, and that upon the occasion of that sale the feoffment was handed over to him. The circumstance of the sale taking place must be dismissed from the consideration of the Court, as there was no legal proof of any sale, no contract in writing being shewn. Assuming, however, that the feoffment was handed over on the occasion of a sale, and that a sale did take place, all that the evidence shewed, was, that the equitable estate was transferred to *Wainwright*; but in ejectment all that the Court has to deal with, is the legal estate. It is immaterial therefore that *Wainwright* claimed the equitable estate, if he did not claim the legal estate under

(a) 1 Stark. Ev. 320, 2nd ed.

(b) 9 Dow. & Ry. 15; 3 C. 6
B. & C. 28.

the feoffment. The consequence of holding this to be sufficient proof of claiming under an instrument will be exceedingly mischievous. It may endanger the security of many titles. In numerous cases it is necessary for purchasers to repudiate what have been delivered to them as the title-deeds of their property, and to rely simply on possession for a long period. The possession of the title-deeds therefore, instead of adding to the security of a purchaser, may detract from it.

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There was no proof of livery of seisin, which is the efficient part of a feoffment. The witness was asked the question, whether or not a memorandum of livery of seisin was indorsed, on the supposition that it was incumbent on the plaintiff to prove that circumstance by the evidence of the subscribing witness to that fact. There is, however, no rule that it is incumbent to prove livery of seisin by the witness subscribing the memorandum of livery of seisin. It may be proved by any one who witnessed the transaction. This is evident by considering the mode in which feoffments were formerly made. It is not even necessary at the present day that a feoffment should be made by deed; and it is only by reason of the Statute of Frauds that it is required to be in writing. The general mode of proving a feoffment before the Statute of Frauds must have been by proving simply that livery of seisin had been given, since a feoffment by parol was the common and ordinary conveyance. In *Coke upon Littleton* (a), the manner of giving livery of seisin by parol is described; and in *Gilbert on Evidence* (b) it is made a question, whether the plea of a feoffment by deed can be considered as proved by shewing a feoffment by parol. There could be no subscribing witness to a feoffment by parol; and the passing of the Statute of Frauds cannot have altered the mode of proof. It may be said that it will be presumed, from the indorsement of livery of seisin, that it was actually delivered. *Doe v. The Marquess of Cleveland* (c) is an express authority to shew that

Third point:
 No proof of
 livery of seisin.

(a) P. 49 b.

(b) P. 75, 6th ed.

(c) 4 M. & R. 666; S. C. 9 B. & C. 864.

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such a presumption cannot be made, from the fact of the indorsement. In *Buller's Nisi Prius* (a) there is the following passage :—" Though a deed of feoffment be proved to be duly executed, yet that is not sufficient to convey a right *unless livery of seisin be likewise proved.*" The same paragraph goes on to say, " If the jury find a deed of feoffment, and that possession has gone along with the deed, yet *unless they expressly find a livery, the Court cannot adjudge it a good conveyance,* for they are only judges of what is law, and have nothing to do with any probability of fact; therefore they cannot conclude that there was a lawful conveyance, unless the jury find a delivery of the fee." It is clear from this passage, that to prove a feoffment by deed, it must be shewn not only that the deed was executed, but that livery of seisin was given; and that livery of seisin is a fact for the jury to find, not for the court or judge to presume. Here there was no finding by the jury of livery of seisin, nor was any evidence of it given. The secondary evidence of the feoffment was therefore improperly received.

Lord DENMAN C. J.—After the close of the case, on its appearing the plaintiff had no title except under the deed of feoffment, leave was given to move to enter a nonsuit. The feoffment was made to the use of *Michael Williams* and *Jeremiah Williams*, for their joint lives and the life of the survivor, and to the heirs of *Michael*. This title is a valid one, provided it can be made out either by the production of the feoffment or by secondary evidence of its contents. The feoffment not being produced, the plaintiff attempted to shew the contents of it by secondary evidence. This was the abstract, which was prepared by the party who produced it, who was employed as the clerk of the vendor on a conveyance from *Houghton* to the defendant *Wainwright*. This abstract of the feoffment was receivable, provided the defendant *Wainwright* claimed under it. *Houghton*, it appeared, entered on the premises after the

First and
second points.

feoffment was executed, and after the *Williams's* had been in possession under it; and *Houghton* being in possession of the premises, sold them to the defendant. Surely it would be quite unreasonable to say the defendant did not claim under *Houghton*, or that the latter did not claim under the *Williams's*, who had no claim except under the feoffment. With regard to the objection that livery of seisin was not proved, that is got rid of by this observation, namely, if it is not necessary to prove the feoffment, which is the deed, neither is it necessary to prove that efficient part of the conveyance by feoffment, livery of seisin. If two parties to a suit claim under another, that dispenses with proof of all the particulars that go to make out a title in the person under whom the claim is made.

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Third point.

PATTESON J.—I am entirely of the same opinion. The notice to produce being proved, the first question is, whether or not the abstract was the proper secondary evidence. I am not prepared to say, if it had been in proof that a copy of the feoffment existed, that that abstract could have been received as secondary evidence without some kind of notice to produce the copy, or the copy itself being proved to be in the possession of the defendant. I do not, however, wish to be concluded by the opinion I am now giving. It is certainly laid down in the books that a counterpart is the next best evidence,—that a copy is the next. The abstract of a deed is the next best evidence after the copy has been accounted for. But here there was no evidence whatever of any copy having existed at all. I think it lay on the defendant, who objected to the secondary evidence that was produced, to shew that there was some better secondary evidence which might have been obtained. The abstract then being in evidence, the next question is, whether or not the subscribing witness to the feoffment ought to have been called. That depends entirely whether or not the defendant claims under that feoffment. Suppose the defendant had produced the feoffment in pursuance of

First point.

Second point.

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the notice, it being clearly traced into his hands, it is not contended that it would be necessary to call the subscribing witness. Here he did not produce it, though it was proved the defendant received it on the conveyance made to him by *Houghton*, and took possession at the same time. It is a little too much for him to say, for the purpose of this case, he does not claim under it; for although no conveyance was proved from *Houghton* to the defendant *Wainwright*, the feoffment was handed over at the time when the sale was made to him. The defendant, then, cannot be permitted to say he does not claim under that feoffment; and if so, the subscribing witness need not be called. The same observation applies to the objection of livery of seisin not being proved; because if the deed of feoffment had been produced, and livery of seisin had been found indorsed on it (as it is found), it would not be necessary to have proved actual livery of seisin, for the same reason, namely, the party producing it claimed under it. It is said the jury did not distinctly find livery of seisin. But the finding for the plaintiff concludes that fact, because there could be no such finding unless the jury were satisfied that livery of seisin had been given.

Third point.

First point.

WILLIAMS J.—I do not think we are required, on the present occasion, to consider how far the abstract would have been admissible, if a copy had been shewn to be in existence. For there was no proof that there was any copy in existence; consequently the abstract was admissible.

Second and
third points.

With regard to the other point, it seems to me quite clear on the present occasion, that the absence of proof of livery of seisin, and of the execution of the deed by the subscribing witness, was immaterial, from the fact that the party claimed under the feoffment; for I cannot imagine that the feoffment was handed over to *Houghton* for a useless purpose. The precise nature of the conveyance by *Houghton* to *Wainwright* was not made out in proof, but it appears there was a purchase, and that at that time

Houghton had the possession of the feoffment, and handed it over to *Wainwright*. Can we fail to draw the inference, from these circumstances, that it was handed over as a part of the title?

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COLERIDGE J.—I am of the same opinion. With respect to the admission of secondary evidence, I have always understood the judge to stand somewhat in the nature both of judge and jury. He is to determine that matter on the circumstances as they satisfy his own mind, very much in the same way that he is obliged to determine whether there has been a sufficient search for the original document in order to let in secondary evidence.

With regard to this abstract, which shewed, that on the face of the deed of which it was an abstract, there was an attesting witness, I thought I must look to see whether it was within the principle of those cases, which determine that where a party claims under a deed, and he produces that deed on notice, it is not necessary for the other party to prove the execution of it; and I thought it fell precisely within that rule of evidence. It was found that a man of the name of *Houghton*, who was an attorney, (which was a circumstance in the case,) was in possession of the property, and being in possession of the property, he was also in possession of the feoffment. It appeared that person had sold to *Wainwright*, the defendant; and that on the sale this particular abstract of deed had been prepared; that the abstract had remained in the possession of the party who produced it, but that the deed in question had been handed over to *Wainwright*, the defendant. Then it appeared, according to the evidence, that *Wainwright* was in possession of this very deed. If *Wainwright* had produced the deed on notice, I do not think it would have been enough for him to say by his counsel, "I do not claim under the deed," when all the evidence shewed he did; and therefore it would not have been necessary to produce the attesting witness as against him; and if not necessary to produce the attesting

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witness to prove the deed itself, I cannot see how it could be necessary to produce the attesting witness when secondary evidence of the deed is to be given.

First point.

As to whether the abstract can be received at all, no account being given of the existence of any copy, I adopt what has been said by the Court already,—that it is not necessary to decide this point,—with one observation only. Supposing the copy had been produced, would it have been necessary to prove this was an exact copy? If not, recourse would have been had then to the same species of infirm evidence. The short abstract of the material facts of the deed, which the witness said he had had occasion at several different times to compare with the deed in question, is surely more satisfactory than parol evidence. I thought, and still think, it was not necessary to call the attesting witness; and it seemed to me, when it appeared livery of seisin had been indorsed on the deed, and that livery of seisin had been attested by the witness, that it fell precisely within the same principle, and that it was no more necessary to call witnesses to prove the livery of seisin than the execution of the deed.

Third point.

Rule refused (a).

(a) The Court granted a rule nisi for a new trial on another ground.

Saturday,
Nov. 5th.

Sir JOHN SCOTT LILLIE v. PRICE.

'Privileged communication' is a defence that may be set up, in an action for defamation, under the plea of not guilty, notwithstanding the R. G. of H. T. 4 W. 4, iv. 1.

LIBEL. Plea; not guilty. At the trial before Lord Denman C.J. at Westminster, at the sittings after last Trinity term, it appeared that the libel complained of was contained in a letter, reflecting severely on the plaintiff, written by the defendant, who was a solicitor, to a party who had been his client up to the day of the letter being written. Between this party and the plaintiff negotiations were going on for the purchase of some property, and the object of the letter

was to give warning against having any thing to do with the plaintiff. The defence set up at the trial was, that the letter, being written by an attorney to one so lately his client, was a privileged communication; and his lordship being of this opinion, the jury, under his direction, found a verdict for the defendant.

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Sir *W. W. Follett* now moved for a rule to set aside the verdict and to have a new trial, on the ground of misdirection. The question, whether a privileged communication should be pleaded in an action of libel, has not expressly been raised since the new Rules; but the point has been before the Common Pleas in a case (*a*), where the inclination of the opinion of that Court appears to have been that a plea of privileged communication did not amount to the general issue. The 4th rule of R. G. H. T. 4 *Will.* 4, lays down, that "in actions on the case the plea of not guilty shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant;" and then one of the instances given is, that "in an action of slander of the plaintiff in his office, profession, or trade, the plea of not guilty will operate to the same extent precisely as at present in denial of speaking the words, of *speaking them maliciously and in the sense imputed*, and with reference to the plaintiff's office or trade." The question then is, is it the same defence that the words were spoken on an occasion that warranted the publication, as that they were not spoken maliciously? and it is submitted that it is not; for the former defence involves a question of law for the decision of the Court, and not for the jury.

It is difficult to say how much of a wrongful act is denied by the plea of not guilty. *Stancliffe v. Hardwick* (*b*) is something similar to the present case; and there it was held, in trover, that the conversion put in issue under the plea of not guilty, was a conversion in fact, and not merely

(*a*) *Smith v. Thomas*, 2 Bing. N. C. 372.

(*b*) 3 Dowl. P. C. 762; 2 C. M. & R. 1.

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a wrongful conversion; and that in cases where there is a conversion, and the defendant insists that such conversion is lawful, he must plead it specially. So here, the libel is written, and if the defendant intended to justify it, he should have confessed and avoided it on the record.

There is another class of cases under the new Rules, where the Statute of Frauds has been sought to be taken advantage of; and it has been held that it must be pleaded. So, in *Barnett v. Glossop (a)*, which was an action for the price of a copyright bargained and sold, and non assumpsit pleaded, it was held that the statutes requiring the agreement to be in writing could not be given in evidence.

On principle, it is a clear violation of the spirit of the new Rules, as admission of the evidence without pleading must be always a surprise on the plaintiff, who does not come to trial prepared to meet it.

Cur. adv. vult.

Nov. 15th.

LORD DENMAN C. J.—We have consulted the other judges upon the point in this case, whether the defence made by the defendant in this action ought not to have been pleaded specially; and we are all of opinion that it is a defence not required to be specially pleaded.

Rule refused.

(a) 1 Bing. N. C. 633.

Saturday,
Nov. 5th.

JONES, Gent. one &c. v. READ.

1. In debt on simple contract, for an attorney's bill in conducting a suit, to

which nunquam indebitatus was pleaded, evidence is admissible, since the rule of H. T. 4 Will. 4, II. 3, to shew that it was agreed that the suit should be prosecuted for the money actually disbursed.

2. Nor is this evidence excluded by the payment of money into Court.

DEBT on simple contract. Plea; nunquam indebitatus, except as to 28*l.*; as to 15*l.*, parcel thereof, a set-off was pleaded, and the residue, 13*l.*, was paid into Court, which

the plaintiff took out. At the trial before *Vaughan B.*, at the last assizes for the county of Chester, it appeared that the action was brought to recover the amount of an attorney's bill for business done by the plaintiff for the defendant in conducting a suit at law. Evidence was tendered, and received by the learned Baron, that the plaintiff had undertaken to conduct the suit for the defendant for the money actually disbursed by him. This evidence was objected to, on the ground that it was not receivable under the state of the pleadings. A verdict was found for the defendant.

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J. Jervis now moved for a rule nisi for a new trial. The evidence received was inadmissible on two grounds; first, it was not receivable under the plea of *nunquam indebitatus*; and secondly, the payment of money into Court admitted the plaintiff's claim.

The rule of Hilary term, 4 *Will. 4*, r. 3, declares that the First point. plea of *nunquam indebitatus* shall have the same operation as the plea of *non assumpsit* in *indebitatus assumpsit*. Rule 1, of the same term, declares that "in all actions of *assumpsit*, except on bills of exchange and promissory notes, the plea of *non assumpsit* shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law." *Edmunds v. Harris* (a), if still law, is an express authority to shew that this evidence was inadmissible in consequence of this rule. [Lord Denman C. J. That case has been overruled (b).]

The payment of money into Court admitted that the Second point. plaintiff had a claim against the defendant for fees due to him as an attorney, and it was not therefore competent for the defendant to give evidence contradictory of that admission. The law raises upon the retainer a contract to pay taxed costs.

(a) 4 Nev. & Man. 182; S. C. 2 Ad. & Ell. 414.

(b) *Cousins v. Paddon*, 2 C. M. & R. 547; *Broomfield v. Smith*, 1 Mee. & Wels. 542.

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By the COURT (*a*).—The payment of money into Court admits that the plaintiff was employed as an attorney, but not that he was to be paid the fees as of right payable to an attorney. The fallacy seems to be in assuming that the common indebitatus count implies that the plaintiff was employed to be paid according to the ordinary fees payable to an attorney.

Rule refused.

(*a*) Lord Denman C.J., Patteson J., Williams J., and Coleridge J.

Saturday,
Nov. 5th.

The KING v. The Churchwardens and Overseers of the
Poor of EDLASTON.

1. A mandamus will issue to compel one of the churchwardens and one of the overseers to concur in making a rate for the relief of the poor, where they refuse to consent unless the rate expressly stated that certain inclosures are within a particular district of the parish.

2. The rule for a mandamus, to concur in making a rate for the relief of the poor, is absolute in the first instance.

GREAVES applied for a mandamus to compel the defendants to make a rate for the relief of the poor of the parish of Edlaston, upon an affidavit made by *Thomas Gadsby*, one of the overseers of the parish, which stated the following circumstances:—Edlaston is a parish maintaining its poor, and is not for that purpose divided into townships. There are two churchwardens and two overseers annually appointed, and from the 10th of August last a rate has been necessary for the relief of the poor. There are two districts in the parish, the one called Edlaston, the other Wyaston, which repair their highways separately. *Shaw*, one of the churchwardens, and *Gadsby*, the overseer, who reside in Wyaston, prepared a rate in the usual form, making no distinction between such persons as occupied lands in Wyaston and such as occupied in Edlaston, and requested the other churchwarden and the other overseer, who both reside in Edlaston, to concur in the rate. Both of them refused either to concur in that, or in the making of any other rate, unless the rate expressly stated on the face of it, that certain inclosures, one of which was in the occupation of

Gadsby, were situate in Edlaston. The churchwarden and the overseer, who reside in Edlaston, are tenants of Mr. *Harrison*, who claims the inclosures in question as encroachments on the waste of the manor of Edlaston, of which he is the lord, and they refused to concur in the rate, by his express directions.

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Greaves, in support of the application. The parish officers who are resident in Edlaston have no right to make use of their office to compel an admission by the officers resident in Wyaston against their interest. If *Gadsby* were to consent to a rate in the form required, it would be an admission that the land he occupies is in Edlaston. Such a rate would be a direct admission by the officers in Wyaston against their interest with regard to the highway rate.

Lord DENMAN C. J. intimated that the rule should be granted.

Greaves then suggested, that the rule ought to be absolute in the first instance, and that there was a case (a) moved by *Ludlow* Serjt. in the Bail Court, in which it was held, that the rule was absolute in the first instance, on the ground that the poor were not to be left to starve, whilst the rule was pending, and if the parties who resisted the rule had any good cause to shew, it might be returned to the mandamus.

Rule absolute in the first instance (b).

(a) Not reported.

though applied for by two of them;

(b) The mandamus would be directed to all the parish officers, al-

see *Anon.* 2 Chit. 254.



1836.

Tuesday,
Nov. 8th.

GILBART and another v. DALE.

1. In an action on the case against the keeper of an office for the booking and forwarding of parcels, where the declaration alleges that a parcel was delivered to D., and that he promised to take care of it that it might be forwarded to its destination, and avers that it was lost through his negligence, on which issue is joined,—it is not sufficient evidence of negligence to shew that the parcel was delivered to D., and that it had not reached its destination.

2. The contract entered into by a booking-office keeper, who takes in parcels to be forwarded by carriers, is only to deliver safely to a carrier.

CASE. The declaration stated that the defendant was lawfully possessed of a certain booking office, for the booking, receiving and taking care of boxes and parcels, in order that the same might be forwarded to the several persons to whom the same might respectively be directed; and the plaintiffs, on &c., at the request of the defendant, delivered to him a box of the value of 20*l.*, containing articles of dress of the value of 50*l.*, to be by the defendant taken care of, in order that the same might be forwarded to a certain person to whom the same was directed; and in consideration thereof, and of a certain reward to the defendant in that behalf then paid by the plaintiffs to the defendant, he, on &c., promised the plaintiffs to take care of the box, and of the goods and chattels therein, in order that the same might be forwarded to the person to whom the same was then directed. Averment, that the defendant had not taken care of the box or the goods and chattels therein, in order that the same might be forwarded, but that by and through the mere carelessness, negligence and improper conduct of the defendant, the box and the goods and chattels therein were lost. Pleas: first, non-assumpsit; second, that the box and the goods and chattels therein were not, nor was any part thereof, by or through the carelessness, negligence or improper conduct of the defendant, lost to the plaintiffs. Upon which issue was joined.

At the trial before Lord Denman C. J., at the sittings after last Trinity term, at Westminster, it appeared that the plaintiffs, who are tailors in Oxford Street, London, having received from a Mr. Jeffries, who resides at Cott Moor, near Pembridge, in South Wales, an order for some clothes, executed that order, and having packed the clothes in a box, delivered it to the defendant, who is the proprietor of the Gloucester Coffee House and booking office attached to the house, directed to — Jeffries, Esq., Cott Moor,

near Pembridge, and paid for the booking. The box did not arrive at its destination. No directions were given by the plaintiffs to the defendant to send the box by any particular coach or conveyance. The counsel for the defendant contended that the plaintiffs ought to be nonsuited, since there was no evidence of neglect of duty, or breach of the contract which the defendant had undertaken to perform, viz. to deliver the box to a carrier. The Lord Chief Justice was of this opinion, and directed the plaintiffs to be nonsuited; and refused to give the plaintiffs leave to move to set that nonsuit aside, and enter a verdict.

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Platt now moved for a rule nisi to set aside the nonsuit and for a new trial. There was sufficient evidence of negligence given by the plaintiffs. In *Griffiths v. Lee* (a), which was an action by a consignee against a carrier for the loss of a parcel of goods, the plaintiff's shopman was called, who proved that he did not know of the delivery, but believed it could not have been delivered without his knowledge. This was held to be sufficient proof of non-delivery; and it was said that the plaintiff could not be expected to prove a non-delivery better, than by shewing that the parcel never reached its destination according to the direction upon it. The plaintiffs here could not shew what became of the box. The burthen of proof was upon the defendant as soon as it was shewn that the box had been delivered to him. How was it possible for the plaintiffs to know what became of the parcel, or to select a carrier against whom they might bring an action? It was for the jury to judge of the effect of the evidence; *Aston v. Heaven* (b).

PATTESON J.—It is said that there was some evidence in this case to prove negligence on the part of the defendant. Let us look at what the contract with the defendant is. The defendant is not a carrier: he is the keeper of a booking office; and his contract with the plaintiffs is, to take care of those goods left with him, that they may be forwarded to their destination either by coach or by some car-

(a) 1 Carr. & P. 110.

(b) 2 Esp. 533.

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rier: in other words, his contract is, to deliver them to some carrier, in order that they may be forwarded. It is necessary therefore, in order to prove a breach of contract, to shew either by direct evidence that the goods had actually been taken from the office, or that the defendant did not deliver them to some carrier, to be forwarded. Was there any evidence of either of those facts? None. All that was proved was, that the articles did not arrive at their destination in Wales. Now, the contract of a carrier is to deliver to the consignee; and *Griffiths v. Lee*(a) is very good authority to shew that the non-delivery to the consignee is sufficient evidence of negligence against the carrier, for *his* contract is to deliver the goods. But it is not so as to the keeper of a booking office: he contracts only to deliver to the carrier. There must therefore be some evidence of non-delivery to the carrier. As in this case there was not, the nonsuit was quite right.

WILLIAMS J.—I am entirely of the same opinion. The contract which arises from the delivery of a parcel to the keeper of a booking office, does not in the least resemble the contract which arises from the delivery to a carrier. If you deliver a parcel to a carrier, he must discharge himself from responsibility by shewing he delivered the goods. But what undertaking was there, in the present case, to deliver the goods to the consignee in Wales. The undertaking by the book-keeper was to deliver them to another person, who was to convey them to the consignee. On the evidence as it stood, it was uncertain whether the loss took place in the hands of the original party to the contract, namely, the defendant, or whether or not he had got rid of his obligation by delivering them to a carrier.

COLERIDGE J.—I am of the same opinion. I do not think it is at all laying down a new principle, but merely applying the principle, governed by rules of evidence, which has been laid down as to actions against a carrier. The law presumes he has performed his duty. In order to raise

(a) 1 Carr. & P. 110.

against a carrier a contrary presumption, the plaintiff must give some evidence of the non-performance of his duty, namely, that de facto he has not delivered the parcel at the place at which he undertook to deliver it. That being done, the burden is thrown on the carrier to discharge himself. I apply that rule to the present case. Here the party has undertaken to deliver to the carrier, not to the consignee; and the plaintiffs must give some evidence of the non-performance of that contract. They attempt to do that in this instance, not by shewing the non-delivery to the carrier, but to the consignee. But the defendant never undertook to deliver the goods to the consignee, but only to the carrier; and there is no evidence that he has not done so. Suppose a case where there are two or three carriers, and one undertakes to carry to York, another to Newcastle, and the third to Edinburgh,—would it be enough to shew as against the first carrier, who undertook to deliver at York, that the goods had not arrived at Edinburgh? That is precisely the course the plaintiffs adopted in this case.

Lord DENMAN C.J.—It was said at the trial, you might as well charge a porter who took a parcel to a shipping office to be conveyed to India, if it had not arrived at Calcutta, as charge the defendant in the present instance because the parcel had not arrived in Wales. It seems to me that is exactly similar to this case. The Court have already expressed their opinion so fully, that it is not necessary for me to say more.

Rule refused (a).

(a) It was contended at the trial, that the plaintiffs ought to be nonsuited for another reason, viz. that the action was brought by the consignors, instead of the consignee, of the parcel. The Court gave no opinion on this point; the argument has therefore been omitted. The rule of Hilary term, 4 Will. 4, iv. 1, and the following

authorities, were referred to at the trial, and in the argument before this Court, on the latter point:—*Dutton v. Solomonson*, 3 Bos. & Pull. 582; the notes to *Wilbraham v. Snow*, 2 Saund. Rep. 47; *Hanson v. Armitage*, 5 B. & Ald. 557; *Moore v. Wilson*, 1 T. R. 659; *Davis v. James*, 5 Burr. 2680.

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If *A.* remits money to *B.* to pay to *C.*, and *B.* promises *C.* to pay it to him, *C.* can maintain an action against *B.* for money had and received.

LILLY v. HAYS.

THIS was an action for money had and received. Plea; non assumpsit. At the trial before Lord *Denman* C.J., at the sittings after last Trinity term, at Guildhall, it appeared that one *Mr. Wood* became indebted to the plaintiff, whilst the former was residing in London, in the sum of 100*l.* for money lent. *Mr. Wood* went to Scotland, and remitted to the defendant 100*l.* to pay to the plaintiff. The defendant promised the plaintiff he would pay him this 100*l.* It was contended that the plaintiff ought to be nonsuited, as there was no consideration moving from the plaintiff for the promise made by the defendant. The Lord Chief Justice refused to nonsuit the plaintiff, in whose favour the jury found a verdict for 100*l.*

Kelly now moved for a rule nisi for a new trial. The plaintiff cannot maintain the present action, because there was no consideration moving from the plaintiff for the promise. There is no privity in the present case between the plaintiff and the defendant. It was competent to *Wood*, who remitted the money, at any time to revoke the order which he had given. It is laid down in *Selwyn's Nisi Prius* (a), that in order to maintain an action of assumpsit the consideration on which the promise of the defendant is made must move from the plaintiff. *Bourne v. Mason* (b), *Crow v. Rogers* (c), and a series of cases, are cited as establishing that proposition. *Price v. Easton* (d) is also an authority to the same effect. No benefit is conferred by sending money to one party to pay it to another.

PATTESON J.—The only question in this case is, whether there is a consideration moving from the plaintiff. It

(a) P. 53, 8th ed.

(b) 1 Ventr. 6.

(c) Stra. 592.

(d) 1 N. & M. 303; S.C. 4 B. & Adol. 433.

is said that such is the rule of law hitherto adhered to; and to that I agree. But in an action for money had and received, there seldom is a direct consideration moving from the plaintiff. Suppose the case of money sent to a general agent, who had promised to pay over the money sent to him,—in an action against him by the person for whose use this money was sent, would it be any answer for him to say, that the consideration did not move from the plaintiff? Again,—Suppose money is sent to a banker for the payment of certain debts,—does not the consideration indirectly move from the creditor whose particular debt is to be paid by the debtor's sending the money. The debtor may be considered as the agent of the creditor, and the money paid indirectly to the banker by the latter. So here, the defendant, though not the general agent, became the agent of *Wood* in this transaction: therefore the consideration did move from the plaintiff, through the instrumentality of *Wood*.

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WILLIAMS J.—I am of the same opinion. The last observation of my brother *Patteson* disposes of the case, since the defendant admitted he received the money for and on account of the plaintiff.

COLERIDGE J.—I quite agree in the principle Mr. *Kelly* has laid down, that the consideration must move from the plaintiff. We must then look to see whether the circumstances do not supply that consideration. Assuming *Wood* to be the agent of the plaintiff, the consideration does move from the plaintiff.

Lord DENMAN C. J.—I thought the plaintiff made the defendant his banker with respect to this matter.

Rule refused.



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Tuesday,
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A certiorari will not be granted to remove an indictment for the obstruction of a highway, on an affidavit, that difficult questions of law might arise; some specific difficulty in point of law must be shewn.

The KING v. JOWL.

THIS was an indictment for an obstruction to a highway, which was found at the last Michaelmas quarter sessions of the peace for the county of Stafford. The highway had not been used for twenty or thirty years, and the defendant had built a brewery on what was alleged to be a part of the highway.

Wightman, upon an affidavit of these circumstances, which also contained a statement that difficult questions of law might arise on the trial, moved for a certiorari to remove this indictment into the Court of King's Bench. [*Patteson J.* There does not appear to be any difficulty in law in this case. It is only a question of fact, whether this is or is not a highway.] It is a mixed question of law and fact. The question whether a road is a highway or not, frequently involves a difficult question of law. Of this the case of *The King v. The Marchioness of Downshire*(a) is an instance. This is in truth an ejectment in the shape of an indictment. [*Patteson J.* You should suggest some specific difficulty in point of law (b).]

By the COURT(c),

Rule refused(d).

(a) 5 Nev. & Man. 662.

(b) See *Rex v. Harrison*, 1 Chitt. 571, where the Court refused a certiorari to remove an indictment from sessions, on an affidavit that difficult questions of law might arise; and see *Ex parte Taylor*, post.

(c) *Patteson*, *Williams*, and *Coleridge*, Js.

(d) The rule for a certiorari is, since the late statute, 5 & 6 Will. 4, c. 33, a rule nisi, and not a rule absolute in the first instance. It was so held by *Coleridge J.* in the Bail Court, in Trinity term last, in *Rex v. The Inhabitants of Wortley*, in which case *Neville* applied for a rule absolute in the first instance.

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MARTIN v. STRONG, Clerk.

THIS was an action for words spoken of the plaintiff, in his business as an assistant to a man-midwife. Pleas: not guilty, and a justification; but on the latter plea no evidence was given. At the trial at the last Gloucester assizes, before *Littledale J.*, it appeared, that in the parish of Painswick, of which the defendant was incumbent, there was a charitable association, for the purpose of providing poor women in child-birth with medical and other assistance. The plaintiff was an assistant to the surgeon and man-midwife of the association, and at a meeting of the committee of the association, respecting complaints against the medical officers, at which the defendant was in the chair; the following conversation took place between the defendant and a *Mrs. H.*, another member of the association:—"I am quite satisfied with *Mr. Martin's* professional skill, but I can assure you the poor women are quite terrified at the thoughts of having him; and one poor woman said, she quite shuddered at his name being mentioned." *Mrs. H.* insisted upon knowing what his conduct had been; the defendant replied, "it was too bad to mention."

Communications made by one member of a charitable association to another, reflecting on the conduct of the medical attendant of the establishment, are not privileged.

A discussion took place at the trial, whether the defendant spoke these words after leaving the chair, but whilst the meeting of the association continued to be held, and before it broke up. The learned judge left it to the jury to say, whether, (supposing that the inquiry being conducted before the committee made all the proceedings privileged,) this conversation was, in fact, a part of the proceedings, and he told them that if it was *bonâ fide* and substantially a part of the proceedings of the committee, it was immaterial whether the defendant had left the chair, as that act did not necessarily put an end to the meeting. The jury found that the inquiry did not form part of the proceedings, and gave their verdict for the plaintiff, with 200*l.* damages.

Sir *W. W. Follett*, (with whom was *Godson*), on a former

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day in this term, moved for a new trial, on the ground that the learned judge should have directed the jury that a communication by the chairman of an association to another member, made *bonâ fide* on matters connected with the objects of the association, was a privileged communication wherever made; and he cited *Bromage v. Prosser* (a), and *Macdougall v. Claridge* (b).

Lord DENMAN C. J.—We will speak to my brother *Littledale* as to the manner in which he left it to the jury (c).

Cur. adv. vult.

Lord DENMAN C. J.—Having ascertained from my brother *Littledale* that he did not leave the question to the jury in the manner supposed by Sir *W. W. Follett*, it only remains to say, that we think the claim set up for any two members of an association to enter into discussions of this kind, much too large a claim of privilege, and unwarranted by any case. We think, therefore, there should be no rule.

Rule refused.

(a) 6 Dow. & Ry. 396; S. C. 4
B. & C. 247.
(b) 1 Camp. 267.

(c) The rule was also moved on
a supposed misdirection by the
learned judge.

Tuesday,
Nov. 8th.

DOE, on the demise of STILWELL, v. MELLISH.

The castle of F. being parcel of the manor of F.; a custom of the manor for the clerk of the castle, who was appointed by the lord of the manor to take surrenders of copyholds in the castle of F., concurrently with the stewards of the manor, is a legal custom.

EJECTMENT to recover some copyhold lands at Farnham. At the trial at the last Surrey assizes at Guildford, before Lord Abinger C. B., a witness was called to prove the surrender of the copyhold tenement in question, who stated that he was clerk to the castle of Farnham, which was parcel of the manor of Farnham, and that he derived his authority by patent from the Bishop of Winchester,

his authority by patent from the Bishop of Winchester,

who was lord of the manor, but that there was no power given him in the patent to take surrenders. He also stated that there was a custom in the manor for the clerk of the castle to take surrenders; that the steward also took surrenders; but that he, as clerk to the castle, had a concurrent authority with the steward. Upon this evidence it was objected, by the counsel for the defendant, that the steward was the proper person to prove the surrender, and that the plaintiff should be nonsuited. Lord *Abinger* overruled the objection, and the plaintiff obtained a verdict.

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Wordsworth now moved for a rule nisi for a new trial. Only the members of the customary court of a manor can take a surrender. The members of that court are the lord, the steward, the deputy-steward, and the tenant. The person who received the surrender in the present case was not shewn to be a constituent part of the customary court.

LORD DENMAN C. J.—I hardly know what is meant by a “constituent” part of the court. This person seems to hold an office in some way connected with the manor, and to state what is the custom, namely, that he was the person to receive the surrender. I know of no proposition of law to prevent that.

PATTESON J.—He seems to have been a sort of deputy-steward for this purpose. I understand he was a person connected with the manor, and by the custom of the manor in the habit of receiving the surrenders.

WILLIAMS and COLERIDGE Js. concurred.

Rule refused (a).

(a) See Lord *Dacre's case*, 1 Leon. 283; *Parker v. Kett*, 1 Lord Raym. 658; *S. C. Salk.* 95.



1836.

Wednesday,
Nov. 9th.

The KING v. The Trustees of the NORWICH and WATTON
Turnpike Roads.

1. Where a jury is impanelled under the General Turnpike Act, 3 Geo. 4, c. 126, to assess the value of the land taken by the trustees belonging to B., C., D., and E., respectively, who are separately interested as lessees, the jury must find and the inquisition must specify the sum to which each is respectively entitled.

2. The certiorari with respect to proceedings under the 3 Geo. 4, c. 126, is not taken away by the 4 Geo. 4, c. 95.


3. The inquisition should set out the notice given to the parties of the intention to impanel a jury. *Semble.*

4. A defect in the inquisition cannot be remedied by any subsequent proceeding.

IN Michaelmas term last *Austin* had obtained a rule, calling upon the trustees appointed by and acting in execution of a local act, for more effectually repairing the road from Norwich to Watton, in the county of Norfolk, and of the General Turnpike Act, 3 Geo. 4, c. 126, to shew cause why a writ of certiorari should not issue, directed to them, to move into this Court an inquisition, lately taken before three of the trustees and a jury impanelled by the sheriffs of the city of Norwich, to assess the sum of money to be paid by the trustees to *Elizabeth Strickland*, and four other persons, as the recompence and satisfaction for their respective estates in certain premises therein particularly specified and required to be taken by the said trustees, and pulled down and removed for the purpose of the local act.

By the 8th section of the local act the trustees are empowered to make a new line of road, and to make the same over the lands described in the map therein mentioned, and also to pull down and remove any of the buildings specified in the schedule thereto annexed, upon making satisfaction to the owners and other persons interested therein, for the damage they might thereby sustain. *Elizabeth Strickland* and *Sarah Rogerson* were the assignees of a lease granted by the corporation of the city of Norwich, for the term of eighty years, commencing on the 29th September, 1794, of certain premises mentioned in the schedule of the local act. *Elizabeth Strickland* was entitled to two-thirds, and *Sarah Rogerson* to one-third. The trustees having occasion for this property, made an offer to Mrs. *Strickland* and Mrs. *Rogerson*, which was refused. In October, 1834, the trustees gave notice to Mrs. *Strickland* and Mrs. *Rogerson*, that they intended to impanel a jury under the provisions of the General Turnpike Act, 3 Geo. 4,

c. 126, in order to assess the value of the property. On the 22d of November, 1834, a jury was impanelled, but was discharged, at the request of the trustees, without delivering a verdict, on account of some informality in the proceedings. On the 20th of November, 1834, the clerk to the trustees had been served with a notice, stating that *Mrs. Rogerson* had assigned her interest to *Henry Etheridge Blyth*, *Thomas Thurlow Wiseman*, and *Henry Gridley*. These parties were therefore served with notice, by the trustees, of the intention of the trustees to impanel a jury on the 5th of November, 1835, to assess the value of the property assigned to them. On the 5th of June, 1835, the trustees were informed that *Mrs. Rogerson* was dead, and that her interest had devolved on *Thomas William Rogerson*, and he was therefore served with a notice of the intended inquisition. On the 5th of November, 1835, an inquisition was taken, of which the following is a copy:

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" City of Norwich, and County } An inquisition taken at the Guild-
 of the same City, to wit. } hall of the said city, this 5th day
 of November, A. D. 1835, by virtue of the precept hereunto annexed
 under the hands and seals of *P. W.*, *W. W.*, and *E. L.*, being three of
 the trustees by or by virtue and acting in execution of an act of parlia-
 ment made and passed in the third year of his present Majesty King
William the Fourth, intituled An Act &c. And in and by a certain
 other act of parliament, made and passed in the third year of his late
 Majesty King *George* the Fourth, intituled An Act &c., before the said
P. W., *W. W.*, and *E. L.*, three of the trustees appointed and acting
 under and by virtue of the said acts of parliament, upon the oaths of
George Rising &c., twelve indifferent men of the said city and county,
 qualified to serve upon juries, who being duly summoned and returned,
 and sworn to inquire into and ascertain and assess the sum or sums of
 money to be paid by the trustees acting in execution of the said first-
 mentioned act, to *Elizabeth Strickland* of &c., *Thomas Rogerson* of &c.,
Henry Etheridge Blyth of &c., *Thomas Thurlow Wiseman* of &c., and
Henry Gridley of &c., some or one of them respectively, as the value,
 recompence and satisfaction of and for their respective estates, rights,
 interests and property of and in all that plasterer's shop &c. in the said
 precept described and hereinafter mentioned, namely &c., situate in the
 parish of St. Giles, in the said city of Norwich, late in the occupation
 of *Samuel Blyth*, mentioned and set forth in the schedule to the said
 first-mentioned act, annexed and marked A, on the map or place in the
 same act mentioned, and also of and in all that stone-mason's shop and

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yard situate &c. All which said shops, hereditaments and premises, are situate, lying, and being in the said city of Norwich, and are required and intended to be taken, pulled down and removed by the said trustees, pursuant to the powers and for the purposes of the said first-mentioned act, and also to inquire into and ascertain and assess the sum or sums of money to be paid by the said trustees, acting in execution of the said first-mentioned act, to any other person or persons, having any estate, term or interest in the premises, as the value, recompence and satisfaction for her or their respective term, estate or interest therein; and also to do and determine all such other matters and things relating to the premises as could or might be lawfully done and determined under or by virtue of the said acts of parliament, or either of them, upon their oaths find, after view had and evidence heard, that the sum of 85*l.* is the value, recompence and satisfaction to be paid to the said *Elizabeth Strickland, Thomas William Rogerson, Henry Etheridge Blyth, Thomas Thurlow Wiseman, and Henry Gridley*, of and for their estates, rights, interests and property of and in the said plasterer's shop, workshed, stable, stone-mason's shop and yard, according to their respective proportions therein. In witness, &c.

The rule nisi was obtained on the ground, amongst others, that the inquisition was defective in not setting out the notice given to the parties, and in not awarding what proportion of the money assessed as damages or compensation should be paid to each party interested in the property (a).

Kelly and Palmer now shewed cause against the rule.

First point:
Certiorari
taken away.

I. The proceedings cannot be moved into this Court, as the certiorari is taken away by the 145th section (b) of the 3 *Geo. 4*, c. 126. It is true that section was repealed by the 86th section (b) of the 4 *Geo. 4*, c. 95. But the 87th

(a) The 84th section of the 3 *Geo. 4*, c. 126, authorizes the trustees of a turnpike road to purchase land for improving the road.

The 85th section of the same statute enacts, that if any person interested in any such lands, upon notice given to him, shall, for the space of thirty days, neglect to treat, then the trustees shall cause the value of the land to be ascertained by a jury, and after they shall have assessed such damages,

they the trustees shall order the money so assessed by the jury, to be paid to the persons interested, according to the verdict or inquisition of such jury, "and such verdict or inquisition, and judgment, order and determination thereon, shall be final," &c.

(b) Sect. 145 of 3 *G. 4*, c. 126, enacts, "that if any person shall think himself or herself aggrieved by any thing done by any justice or justices of the peace, in pursu-

section of the latter act also takes away the certiorari.
[Coleridge, J. The 87th section of the 4 Geo. 4 only takes

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ance of this act, except under the particular circumstances hereinafter mentioned, and for which no particular method of relief hath been already appointed, such person, in case the penalty or forfeiture shall exceed the sum of 40s., where the appeal is to be against a conviction for a penalty or forfeiture, may appeal to the justices of the peace at the next general or quarter sessions of the peace to be held for the limit wherein the cause of such complaint shall arise, such appellant first giving or causing to be given to such justice, by whose act or acts such person shall think himself or herself aggrieved, notice in writing of his or her intention to bring such appeal, and of the matter thereof, within six days after the cause of such complaint arose, and within four days after such notice entering into recognizances before some justice of the peace, with two sufficient sureties, conditioned to try such appeal at and abide the order of, and pay such costs as shall be awarded by the justices at such quarter sessions, and also to pay the penalty or forfeiture in case the conviction should be affirmed; and each and every justice of the peace having received notice of such appeal as aforesaid, shall return all proceedings whatever had before him respectively, touching the matter of such appeal, to the said justices, at their general quarter sessions aforesaid, on pain of forfeiting 50l. for every such neglect; and the said justices at such sessions, upon due proof of such no-

tice having been given as aforesaid, and of such recognizance having been entered into in manner before directed, shall hear and finally determine the causes and matters of such appeal in a summary way, and award such costs to the parties appealing or appealed against, as they the said justices shall think proper to be levied and recovered, as hereinbefore directed, and the determination of such quarter sessions shall be final and conclusive to all intents and purposes, *and no proceeding to be had or taken in pursuance of this act shall be quashed or vacated for want of form, or removed by certiorari*, or any other writ or process whatsoever, into any of His Majesty's Courts of Record at Westminster, any law or statute to the contrary notwithstanding; Provided always, that in case there shall not be time to give such notice, and enter into recognizances as aforesaid, before the next sessions to be holden after the conviction of the appellant, then and in every such case such appeal may be made to the next following sessions, and shall be there heard and determined."

The 86th sect. of the 4 G. 4, c. 95, recites the 145th sect. of the 3 G. 4, c. 126, verbatim, and repeals it.

The 87th sect. of the 4 G. 4, c. 95, enacts, " Provided always, and be it further enacted, *that if any person shall think himself or herself aggrieved by any order, judgment or determination made, or by any matter or thing done by any justice or justices of the peace, or by any trustees or commissioners of any*

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away the certiorari in relation to proceedings in pursuance of that act. This is a proceeding under the 3 Geo. 4.]

turnpike road, in pursuance of this act or the said recited act, or any local act, for making, repairing or maintaining any turnpike road, (except where the order, judgment or determination of any such justice or justices, trustees or commissioners, are hereby declared to be final and conclusive, and except under the particular circumstances hereinafter mentioned,) and for which no particular method of relief hath been already appointed, such person may appeal to the justices of the peace, at the next general or quarter sessions of the peace to be held for the county, division, riding, or place wherein the cause of such complaint shall arise, such appellant first giving or causing to be given to such justice, commissioner or trustee, by whose act or acts such person shall think himself or herself aggrieved, notice in writing of his or her intention to bring such appeal, and of the matter thereof, within six days after the cause of such complaint shall arise, and within four days after such notice entering into recognizances before some justice of the peace, with two sufficient sureties, conditioned to try such appeal at, and abide the order of, and pay such costs as shall be awarded by the justices at such general or quarter sessions, and also to pay the penalty or forfeiture, in case the conviction should be affirmed; and each and every justice of the peace, commissioner or trustee, having received notice of such appeal as aforesaid, shall return all proceedings whatever had before him re-

spectively, touching the matter of such appeal, to the said justices, at their general or quarter sessions aforesaid, and the said justices at such sessions, upon due proof of such notice having been given as aforesaid, and of such recognizance having been entered into in manner before directed, shall hear and finally determine the causes and matters of such appeal in a summary way, and award such costs to the parties appealing or appealed against, as they the said justices shall think proper, to be levied and recovered by distress and sale of the goods and chattels of the person or persons against whom such determination shall be given, and the determination of such general or quarter sessions shall be final and conclusive to all intents and purposes, and *no proceeding to be had or taken in pursuance of this act shall be quashed or vacated for want of form, or removed by certiorari, or any other writ or process whatsoever, into any of his majesty's Courts of Record at Westminster, any law or statute to the contrary notwithstanding: Provided always, that in case there shall not be time to give such notice, and enter into such recognizances as aforesaid, before the next sessions to be holden after the conviction of the appellant, then and in every such case such appeal may be made to the next following sessions, and shall be there heard and determined: Provided always, that no appeal shall be allowed against any conviction for any penalty or forfeiture which shall not exceed the sum of 40s."*

The 3 *Geo. 4* and 4 *Geo. 4*, ought to be construed as one statute. The 87th section of the 4 *Geo. 4* enacts, that if any person shall think himself aggrieved by the act of any commissioners under that act, *the 3 Geo. 4, or any local act*, he may appeal to the quarter sessions, and the determination of the sessions shall be final and conclusive; and it then proceeds to enact, that no proceeding shall be vacated for want of form or removed by certiorari. It was evidently the intention of the legislature that the certiorari should be taken away in all cases where it was intended that the determination of the sessions should be final. The clause is loosely worded, and the expression in the latter part of it, "this act," means the acts mentioned in the preceding part of the clause.

II. The inquisition is not defective, as it was not necessary to set out the notice in it. There is nothing in the act which requires the jury, or any individual, to recite the notice or any previous proceeding. All that ought to appear on the face of the inquisition is, that which the jury are by statute directed to find, and they are not directed to inquire whether notice has been given. [Lord Denman C. J. Are you aware of the case of *The King v. Bagshaw*? (a)] There the adjudication was final. This is an interlocutory proceeding. After the inquisition has been taken, the trustees are to make an order for the payment of the money, and that order is like a judgment, and is the final proceeding. It may be inferred from the statement in *Rex v. Bagshaw* (a), that no notice in fact had been given.

III. The applicants are premature in their application; for if it be necessary to set out the notice in the order consequent upon the inquisition, it is not necessary to set it out in the inquisition itself, for that is merely drawn up for the guidance of the trustees or commissioners. It would be subjecting trustees to much annoyance, if at every step they are to have their proceedings removed by certiorari. Such matters are only stated in the inquisition as the legislature have required the jury to determine. Where the

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Second point:
Inquisition
defective in
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the notice.

Third point:
The applica-
tion prema-
ture, the inqui-
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Fourth point:
The inquisition defective
in not apportioning the
sum assessed.

First and third
points.


legislature has conferred an authority, the Court will presume that that authority has been properly executed, unless the contrary appears.

IV. It was not necessary that the jury should by their verdict apportion the compensation awarded by them. Neither the jury nor the trustees had any means of ascertaining what particular proportion each individual was entitled to. By the 85th section of the 3 *Geo.* 4, the duty of the jury is only to ascertain the value of the premises.

Biggs Andrews and *Austin*, in support of the rule. The certiorari is not taken away, for the reason already given by Mr. Justice *Coleridge*. This is not an interlocutory proceeding. It is a judgment, and is expressly so called in the 85th section of the 3 *Geo.* 4. The words are, that "such verdict or inquisition and judgment &c. shall be final." The order for the payment of the amount of the verdict might be by parol. This is not a matter done by the commissioners, but by the jury, and the act of the 4 *Geo.* 4 only gives an appeal in respect of acts done by the commissioners or trustees. Granting, therefore, what is contended for by the other side, that it was intended to take away the certiorari in all cases where there is an appeal given; there is no appeal in this case, and therefore the certiorari cannot be held to be taken away. It is said that the words "this act" (*a*), in the latter part of the 87th section of 3 *Geo.* 4, is to be construed as meaning any act. If so, the word "hereby," which is in the preceding part of the section, must be construed as meaning by any act. Reading the 87th clause in this way, the effect will be, that there will be no appeal against an order of the trustees; for the clause says, that if any person shall think himself aggrieved by any order of the trustees, he may appeal, (except where the order is "hereby" declared to be final,) and by the 85th section of the 3 *Geo.* 4, c. 126, it is enacted, that the verdict or inquisition, and judg-

(*a*) See the 87th sect. *ante*, 35.

ment, order and determination thereon, shall be final. The argument, therefore, that it was intended to take away the certiorari where an appeal is given, does not apply, for construing the section in the mode contended for no appeal is given. From the nature of the proceeding no appeal lies. By sect. 87, of the same act, if the jury give a verdict for a larger sum than was offered by the trustees for the property, the costs of the proceedings are to be paid by them. If the verdict is for less than was offered, the expenses are to be borne by the parties interested in the property. This therefore is an absolute proceeding, without reference to any appeal. Suppose an appeal to the sessions, could they give the costs of the previous proceedings? It is evident from this provision, that it was not intended there should be an appeal to the sessions in this case.

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II. The inquisition is defective in not stating that the trustees had issued any precept, or that proper notices had been given. It is only after proper notices have been given to the parties interested in the property, that the trustees are authorized to issue a precept. *The King v. Bagshaw* (a) is a case precisely in point; there the precept was set out, and the notice was not, and the omission was holden to be a fatal defect. *The King v. Wilson* (b), *The King v. The Corporation of Liverpool* (c), and *The King v. Sheppard* (d), all shew, that every circumstance necessary to give an inferior jurisdiction authority should be set forth in the judgment. Second point.

III. The inquisition is likewise defective in not apportioning the damages amongst the claimants. It is admitted that the parties have distinct interests, and yet the jury have not complied with the statute, and assessed the damages due to each separately. Besides, no sum is awarded to the corporation as the owners of the fee. All that is done is, to find the value of the land. No damages are assessed in consequence of the road intersecting the property of all Fourth point.

(a) 7 T. R. 363.

(c) 4 Burr. 2244.

(b) 5 Nev. & Man. 164.

(d) 3 Barn. & Ald. 414.

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Second point.

the claimants, or of their obligation to keep in repair additional fences, which they would be obliged to do; *Rex v. The Commissioners of Llandilo Roads* (a).

Lord DENMAN C. J.—One objection taken to this inquisition is, that it does not contain such a notice as the act of parliament requires, to give jurisdiction to the trustees and to the jury. I do not think it necessary to enter upon this question at any length, because *The King v. Bagshaw* (b) is a clear authority to shew, that if on the whole proceeding no notice appears, the proceedings are void for want of shewing jurisdiction.

Third point.

Whether this defect may be supplied hereafter, I do not think it necessary now to consider, because, even if it can, there is a conclusive objection to the inquisition as it is found, and that is, that there are several parties with separate interests, and the jury are impanelled and sworn to give them compensation according to their *several* interests; instead of doing which, they have given a compensation in one sum to the whole of those parties.

Fourth point.

First point.


But then it is questioned whether we can entertain this argument, as to the invalidity of the inquisition, by reason of the certiorari being in terms taken away. In certain cases the certiorari is taken away by the 87th section of the 4 Geo. 4, c. 95, in these terms, “no proceeding to be had or taken in pursuance of this act shall be quashed or vacated for want of form, or removed by certiorari.” The proceedings which are prohibited from being removed by certiorari, are proceedings taken in pursuance of that act. It is argued that the words “in pursuance of this act,” mean in pursuance of this or the former act of the 3 Geo. 4, since by the same section an appeal is given against an order made either under the 3 Geo. 4 or the 4 Geo. 4, and that the two are thus treated as one act. I do not think this a just conclusion. Each of the two acts is made distinctly to operate in various ways. The proceeding which cannot be

(a) 2 T. R. 234, per *Grise J.*

(b) 7 T. R. 367.

removed is a proceeding which the 4 *Geo. 4* recognizes, and not a proceeding which it recognizes and adopts only as created by the former act of the 3 *Geo. 4*. But it is said there is an appeal given in this case, and that it was intended to take away the certiorari in all cases where an appeal is given. Assuming that it was intended to take away the certiorari in all cases where there was an appeal, there is no appeal in this case. This is not an act done by the trustees, or the commissioners, but by the jury impanelled under their authority, and it is only against an act done by any justice of the peace, trustee or commissioner, that by the 4 *Geo. 4* an appeal is given. I think, therefore, that the certiorari is not taken away, that there is a fatal defect in an essential part of these proceedings, and that any subsequent order made by the trustees must fail.

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PATTESON J.—I am also of opinion that this rule must be made absolute. With respect to the question whether the certiorari is taken away, it seems to me to be quite clear that the 87th section of the 4 *Geo. 4*, does not apply to this proceeding. This is a proceeding under the 3 *Geo. 4*, c. 126, and not a proceeding on the 4 *Geo. 4*, c. 95, either entirely or partially. In the clause of the latter act, which says “that no proceeding to be had or taken in pursuance of *this act*, shall be quashed or vacated for want of form, or removed by certiorari,” it is clear “*this act*” means the 4 *Geo. 4*, c. 95; so *far* the words of the legislature are plain, and shew that the certiorari is not taken away as regards this proceeding. But it is argued, that as it says, that if any person shall feel himself aggrieved, not only in case of proceedings under this act, but in case of proceedings under the said recited act, (that is, the 3 *Geo. 4*, c. 126,) “or any local act” whatever, he may appeal at the quarter sessions, therefore the certiorari was intended by the legislature to be taken away: that the taking away of the certiorari was to be co-extensive with the appeal. If such was the meaning of the legislature, they have not so

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said. When in one part of the section the expression "the act or the said recited act" is used, and in another part of the section "*this act*" only, and the words "the said recited act" is omitted, it must be presumed that the legislature intended to express a different meaning by these different expressions. Even if the expressions meant the same thing, Mr. *Andrews* seems to me to have argued very justly, that if the words "this act" are to be construed *any act*, in the latter part of the clause, then in the exception, in the preceding part of the clause, the word *hereby* is to be construed by *any act* whatever. If you choose to construe "*this*" as "*any*," "*hereby*" must mean by *this act* or *any act*, which seems to me to shew you are not to construe it so in either case—that exception, no doubt, is very absurdly worded, because the provision is to give an appeal, if any person shall think himself aggrieved by proceedings under *this act* or the said recited acts. The better way is to abide by the words of the act, which is to say the certiorari shall be taken away in case of proceedings under *this act*. The proceeding in question is *not* under *this act*, and therefore the certiorari is not taken away.

Third point.

Then it is said, assuming the inquisition to be defective, it is not the final proceeding, and that therefore the application for a certiorari is too soon; that we should wait until the order, which the trustees are directed to make after the inquisition is taken, is made by them. The words of the 85th section of 3 *Geo. 4*, c. 126, are, "after the said jury shall have inquired of and assessed such damages and recompence, they the said trustees or commissioners shall thereupon order the sum so assessed by the jury to be paid to the said owners or other persons interested, according to the verdict or inquisition of such jury." It then goes on to say, "and such verdict or inquisition and judgment, order and determination thereon, shall be final, binding and conclusive." A verdict of a jury is never, in legal phraseology, called a judgment. Judgment follows the verdict. It is true the word 'judgment' appears in the act, between the inquisition

and order, and there has been no allusion to any thing like a judgment before. Then the question is, whether the order of the trustees is so necessary to complete this proceeding, that we cannot deal with the inquisition until the order is made. It seems to me that it is not so; the trustees have no power whatever under this act of parliament to give what is really a judgment, or to exercise any discretion whether the verdict is right or wrong, or to hold any jurisdiction over it; but they are directed to make an order for the payment of the money assessed by the inquisition, according to the finding of the jury. It is no judgment, or any thing in the nature of a judgment, but merely what sometimes they are directed to do, merely in a ministerial capacity; and therefore the inquisition is really and truly that which is binding. If so, we may look at the inquisition itself.


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There are several objections to the inquisition. The objection mentioned by my lord, the awarding one aggregate sum as compensation to the parties, is in my opinion a fatal objection. The notices are several, the interests of the parties are several, the jury themselves are sworn to try the cases of the *respective parties*, and yet they award one aggregate sum. Fourth point.

It is not necessary, therefore, to determine whether or not the notice, which is required to have been given, in order to found the jurisdiction of the trustees to summon a jury, must appear on the face of the inquisition. All I would say on this point is, (and I wish not by any means to be precluded by this opinion,) I think the notice ought to appear on the face of the inquisition, although not as part of the finding of the jury, because it has been very properly argued, the jury are not bound to find that, but only what the value of the property is. Second point.

WILLIAMS J.—The only doubt I had at all on this case was that which has been discussed by my brother *Patteson*, whether this application was not premature, in consequence Third point.

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of some other proceeding being necessary in order to make the whole complete. Any doubt I had on that point is removed by this consideration, that the order of the trustees could in no manner differ from the inquisition, which is the foundation of the whole proceedings. The order is merely a ministerial and formal act, and cannot amend any portion of the proceedings which have previously occurred.

Agreeing then, as I do, that the inquisition is the point really to be considered, undoubtedly, for the reasons that have been given, I entertain no question but that the inquisition is defective.

Second point. It is not necessary to give a final opinion, but it appears to me also, that the notice given should have been stated on the face of this inquisition, as every circumstance necessary to give an inferior court jurisdiction ought to appear upon the face of the proceedings.

Fourth point. With regard to the other objections to the inquisition, I shall only say, that it seems to me that the circumstance of the jury assessing the compensation in one aggregate sum, is a fatal objection.

First point. With regard also to the certiorari being taken away, I entirely agree with the view that has been taken by my lord and my brother *Patteson*. It seems to me that the certiorari is not to be taken away by doubtful or uncertain words.

First point. COLERIDGE, J.—I am of the same opinion. The first point in this case, which was the most important of the whole to consider, in my view of the case, was, whether the certiorari was taken away. I have always understood the rule to be, that express words are necessary to give an appeal from an inferior court, and express words are necessary to take away from the Court of King's Bench its jurisdiction to issue a certiorari. *The King v. Terrett* (a) affords an illustration of this rule. An act of parliament was passed, giving an inferior court jurisdiction,

(a) 2 T. R. 735.

and with respect to the proceedings under it, the certiorari was taken away. A subsequent act of parliament was passed, enlarging the power of the inferior court, but without the clause taking away the certiorari. It was held that the clause in the former act, taking away the certiorari, could not be incorporated in the latter, and that the Court of King's Bench had its jurisdiction as to the proceedings under the latter act. The proceeding in the present case is clearly under the 3 *Geo.* 3, and in that act there is a clause taking away the certiorari—that clause was repealed—in consequence of that repeal the jurisdiction of the Court of King's Bench revived as to every proceeding under the 3 *Geo.* 4. Has that jurisdiction, thus revived, been taken away? The 87th clause of the 4 *Geo.* 4, substituted in lieu of the clause of 3 *Geo.* 4, is confined to the proceedings taken in pursuance of the 4 *Geo.* 4. It is therefore quite clear the certiorari is not taken away. A good deal of argument has been entered into on both sides, whether or not an appeal lies to the Court of Quarter Session as to this proceeding; that is a very powerful argument to use by way of making it probable or improbable that the certiorari is or is not taken away. But it is an argument of probability only. There may be an appeal and yet no certiorari. There may be no appeal and yet a certiorari.

The next question is, whether the certiorari lies in Third point. this stage of the proceeding, or whether the parties are bound to wait until the whole matter is concluded, and the order of the trustees is made. Whenever the defect is one that never can be remedied in the ultimate proceedings that take place, then the parties who are interested in the proceeding being formal and correct, have a right to come to this Court as soon as that irremediable defect is discovered. It must not be assumed in cases of this description, that the party who is the land-owner is always averse to part with his land; he may be anxious to part with it and get compensation; he is as much interested in having

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the proceedings valid as the trustees of the turnpike road. As soon as he sees the proceedings have been so conducted, and are in that state that he never could have his compensation securely given to him, he has a right to come to the Court and say, "Let these proceedings at once be quashed, that they may go on in a correct and regular course for the future." Then the remaining question is this, is this or not one of those defects which cannot be cured in any stage of the proceeding? It is clear it is, because all that the trustees have to do in their order, is to direct the sum of money to be paid in the manner the jury have assessed it, and to the persons in the proportion the jury have awarded it; so that whatever defect there is of this sort, (and the defect on which I rely is that of the non-division of compensation money,) is one that must always remain. When it is seen what the jury were impanelled to do, and when it is found that they really have not done that, but have put matters in such a state that very serious questions may arise hereafter between the parties as to the division of this money, and as to costs, I think it is enough to say the jury have not done that which they were directed to do. If we suppose, instead of there being three or four lessees of this property, all entitled in different shares, (and acknowledged to be entitled in different shares by the notice that has been given,) the reversioner also had been interested, and notice had been given, the form of the impanelling of the jury would have been just the same; they would have been directed to find what was due to *A. B.*, *C. D.*, and *E. F.*, for their respective estates and interests in the land, (the reversioner to have his share and the lessees their shares). Then, according to the argument, a gross sum might be awarded to be paid to the reversioner and lessees, and it would be for them afterwards to settle what proportions each was to have. But this seems to me to be an essential defect, which can never be remedied by any thing subsequently to be done, and

therefore that the parties are entitled to take advantage of it in this stage of the proceedings.

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PARRY v. DEERE.

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ASSUMPSIT for the use and occupation of a messuage and land. Plea: non-assumpsit, and a set-off. At the trial before *Littledale J.*, at the last Berkshire assizes, a verdict was found for the plaintiff. It appeared at the trial that the action was brought to recover the balance of rent for the occupation of Donnington Priory, and twenty-five acres of land around, and two other fields, which had been occupied by the defendant, as tenant to the plaintiff, and which he had quitted at Lady-day, 1834. The plaintiff gave in evidence the following agreement, which was stamped with a *3l. ad valorem* stamp, dated the 19th March, 1824, and signed by both parties.

A lease, which demised a dwelling-house and land at a rent certain, and then demised two fields, from the succeeding Michaelmas, at the same rent which the lessor received from the persons who then occupied them, does not require, on account of the latter demise, a stamp of 1*l.* 15*s.* It is sufficient if such an *ad valorem* stamp is affixed, as will cover the whole amount of rent to be paid.

"Mrs. *Parry* agrees to let to Mr. *John R. Deere*, Donnington Priory, with twenty-five acres of land thereto belonging, as lately occupied by Admiral *Bertie*, with all rights and appurtenances to the house and lands and premises belonging, from the 25th day of March instant, for the term of fourteen years, at the rent of 200*l.* for the first ten years of the said term, and at the rent of 210*l.* for the remainder of the said term, to be paid half-yearly. The rent is reduced from two hundred guineas (as originally intended) for the first ten years, in consideration of Mr. *Deere* making a new drive to the house, as proposed, the expense of which is not to exceed 100*l.* Mr. *Deere* to pay tenant's taxes. The repairs to be done as settled by Mr. *Money*. Mr. *Deere* to have a lease for fourteen or twenty-one years, at Mrs. *Parry's* option. Mrs. *Parry* also agrees to let to

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Mr. Deere the two fields occupied now by Mr. Slocock and Mr. Holloway, from Michaelmas next, being the end of their present current year therein, at the same rent she now actually receives of them, for the same and for the like term as Mrs. Parry agrees to let him have the house and premises before mentioned."

The two fields occupied by Mr. Slocock and Mr. Holloway were let for 10*l.* and 12*l.* a year respectively. It had been objected, in the course of the trial, that this agreement was not properly stamped, and could not, therefore, be received in evidence; and *Turner v. Power* (a) was cited. The learned Chief Justice gave the defendant leave to move to enter a nonsuit.

Ludlow Serjt. now moved accordingly. The document was not properly stamped. In the 55 *Geo.* 3, c. 184, (b) there are three descriptions of leases mentioned: First, a lease or tack of any lands at a yearly rent, without any sum of money by way of fine, upon which an ad valorem stamp is imposed, according to the amount of rent reserved. Secondly, a lease or tack of any lands granted in consideration of a sum of money by way of fine, and also of a yearly rent amounting to 20*l.* or upwards, upon which an ad valorem duty is also imposed. Thirdly, a lease or tack, not

(a) 7 B. & C. 625; S. C. 1 Mood. & M. 131.

(b) Lease or tack of any lands, hereditaments or hereditary subjects, at a yearly rent, without any sum of money by way of fine, premium or grassum, paid for the same.

And where the same shall amount to 200*l.* and not amount to 400*l.*

£3 0 0

Lease or tack of any lands, hereditaments, or hereditary subjects, granted in consideration of a sum of money by way of fine, premium, or grassum, and also of a yearly rent, amounting to 20*l.* or upwards

Both the ad valorem duties payable for a lease, in consideration of a fine only, and for a lease in consideration of a rent only of the same amount.

(Save and except the leases and tacks hereinbefore excepted

Lease or tack of any kind not otherwise charged in this schedule

£1 15 0

otherwise charged in the schedule. The sum payable on this last description of lease is 1*l.* 15*s.*; and the instrument given in evidence at the trial ought to have had 1*l.* 15*s.*, in addition to the ad valorem stamp. For the two fields occupied by *Slocock* and *Holloway* no certain rent was reserved, and no ad valorem stamp was payable in respect of that demise. The ad valorem stamp is imposed on the consideration which appears on the face of the document. This is evident from *Robinson v. Macdonnell* (a), where it was held, that a deed indorsed on a former deed stamped with an ad valorem stamp, was exempt from an ad valorem duty. What was the consideration for the demise of these two fields did not appear on the face of the document, and therefore no ad valorem stamp could be imposed. The 1*l.* 15*s.* stamp, therefore, attached. [*Coleridge* J. Suppose a new lease, indorsed on an old lease, which reserved a certain rent, and that the indorsed lease stated that the lessee was to hold upon the former terms, and at the former rent, would not that require an ad valorem stamp?] That might require an ad valorem stamp. The present lease is not indorsed on a former. Suppose this was an action for use and occupation for these two fields, an unstamped piece of paper, which stated that the defendant should hold the land at the same rent as the former tenant held it, would not be receivable in evidence. The demise of these two fields is as distinct from the other demise in the document, as if it had been on a separate piece of paper.

Lord DENMAN C. J.—We will examine the instrument given in evidence, and see whether it was properly stamped.

Cur. adv. vult.

Lord DENMAN C. J. on the 8th of November said—We have no doubt at all that the instrument given in evidence was properly stamped, and that it is not within that

(a) 5 M. & S. 228.

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class of leases designated in the act as "leases not otherwise charged in the schedule."

Rule refused (a).

(a) See *Boase v. Jackson*, 6 Moore, 480; *S. C.* 3 B. & B. 185. In this case *Talfourd* Serjt., made a cross motion, pursuant to leave given to him at the trial, to increase the damages from 70*L.*, the amount of the rent due, to 170*L.*, on the ground that the defendant had not made a drive in pursuance of the above agreement. The Court refused the rule.

Wednesday,  
Nov. 9th.

The KING v. HIGGINS.

The Court of King's Bench has no power to award costs in criminal proceedings in a court below, although those costs may have been incurred by the defendant's improperly suing out a certiorari, which was afterwards quashed.

AT the Michaelmas quarter sessions, 1834, for the county of Hereford, a bill was found against the defendant for obstructing a highway, to which the defendant appeared at the Epiphany sessions following, pleaded not guilty, and traversed to the Easter sessions; but he gave no notice of trial till the proper time before the next Michaelmas sessions. The prosecutor brought down his witnesses to those sessions, which commenced on the 19th October, and instructed counsel; but nearly at the close of the sessions, on the 21st October, the defendant produced a certiorari to remove the indictment into the King's Bench, which, it appeared, had been obtained in the month of March previously. No countermand of the notice of trial, or intimation of the issuing of the certiorari, had been given to the prosecutor. A rule having been obtained calling upon the defendant to shew cause why the certiorari should not be quashed, and a procedendo awarded, and why the defendant should not pay the costs incurred at the Michaelmas quarter sessions;

*Talfourd* Serjt., and *Kelly*, now shewed cause (a). At

(a) The rule being made absolute for quashing the certiorari and awarding a procedendo, on the merits, the first part of the argument is omitted.

all events, that part of the rule applying for costs must be discharged, as this Court has no jurisdiction over costs incurred in a court below. [Lord Denman C. J. referred to *Rex v. Bartrum* (a).] In that case the cause was in this Court; but there is no instance of the Court ordering costs in a prosecution not before them. There is a power at nisi prius to award costs; and if the certiorari be not quashed, the judge who tries the case may then give the costs incurred at the sessions (b).

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*Maule and Greaves*, contra. The judge who tries the case could not give costs, as the 65th section of the Highway Act (b) only gives that power when the duty of repairing the highway comes in question. In this case the costs at the sessions were caused through the vexatious conduct of the defendant. In order to prevent the prosecutor from being harassed by such conduct, the Court will make the defendant pay these costs. *Rex v. Bartrum* (a) shews that that is the settled practice of this Court. [Coleridge J. Has the Court the power to award costs, except by statute? The 5 & 6 W. & M. c. 11, gives the power in one case, and there is a power given by the Highway Act (b) in another.] It is submitted there is such a power, for in *Rex v. Allen* (c), on an information for perjury, Lord Holt said, "If the person indicted gives notice of trial, and does not proceed, the prosecutor shall have costs." [Patterson J. Those were costs after the cause was brought into this Court.] The question is, at what time the certiorari attaches. The sessions, although continued for several days, are in point of law looked upon as being held on the first day; and for the purpose of doing effectual justice, this Court will consider that the certiorari, though in fact delivered at the end of the sessions, was in point of law delivered at the first sitting of the Court, and then the costs

(a) 8 East, 269.

(c) Comb. 225.

(b) 13 Geo. 3, c. 78, s. 65.

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incurred at the sessions were incurred after the writ attached. [Lord Denman C.J. Are you aware of *Rex v. Passman* (a)?] There the certiorari was sued out by the prosecutor, who did nothing but what he had a just right to do, the notice of trial had been given by the defendant; and the motion was for costs, admitting the certiorari to be properly sued out; but Lord Denman C. J. distinguished it from *Jones v. Davies* (b), where a certiorari was improperly sued out, and without notice to the opposite party; and this Court ordered the party who caused it to be issued to pay costs. The last case is submitted to be good law, and it is confirmed by *Stacey v. Evans* (c).

LORD DENMAN C. J.—*Stacey v. Evans* (c) appears to proceed on the authority of *Jones v. Davies* (b); and that case is denied both by my brother Littledale and Mr. Justice Taunton, in *Rex v. Passman* (a). And as I cannot find that the Court has any authority to award costs on proceedings in another Court, those cases must be taken to be overruled by *The King v. Passman* (a).

PATTESON J., WILLIAMS J., and COLERIDGE J., concurred.

Rule absolute for the certiorari to be quashed, and a procedendo awarded, but discharged as to costs (d).

(a) 3 N. & M. 730; S. C. 1 Ad. & Ell. 603.

(b) 1 B. & C. 143.

(c) 13 Price, 449.

(d) As to costs on the removal of proceedings by certiorari, see the 21 Jac. 1, c. 8; the 5 & 6 W. & M. c. 11, amended and continued by 8 & 9 W. 3, c. 33; the 5 Geo. 2, c. 19; and the following cases, *Rex v. Smith*, 1 Burr. 54; *Rex v. Chadderton*, 5 T. R.

272; *Rex v. Clifton*, 6 T. R. 344; *Rex v. Commerell*, 4 M. & S. 403; *Rex v. Kettleworth*, 5 T. R. 33; *Rex v. Taunton St. Mary*, 3 M. & S. 465; *Rex v. St. John the Baptist, Margate*, 6 M. & S. 130; *Rex v. Turner*, 15 East, 570; *Rex v. Ingleton*, 1 Wils. 139; *Rex v. Jenkinson*, 1 T. R. 82; *Rex v. Dewnapp*, 16 East, 194; and 5 & 6 Will. 4, c. 33.

The KING v. The Lord of the Manor of HEXHAM, and  
the Steward of the same Manor.

1836.

Wednesday,  
Nov. 9th.

IN Hilary term a rule nisi had been obtained for a mandamus, directed to the defendants, commanding them to admit *Richard Errington* to certain copyhold tenements within and parcel of the manor of Hexham, as right heir of *Elizabeth Armstrong*, deceased, the late tenant thereof, according to the custom of the manor.

Where there  
are two claim-  
ants by differ-  
ent titles to a  
copyhold tene-  
ment, the lord  
must admit  
both.

The following circumstances were stated in the affidavit in support of the rule:—*Elizabeth Armstrong* was seised in fee, at the will of the lord of the manor of Hexham, of a copyhold tenement within the manor, called Nether Audley, descendable according to the course of common law. On 17th June, 1765, she surrendered the same to the use of her will. On 3d April, 1770, she made her will, and devised the tenement to trustees for 99 years, upon trusts which have been since performed, (with a proviso for cesser;) and after the expiration of the said term, to *John Scott* for life, remainder to his sons successively, according to their seniority, in tail male, remainder to *William Scott*, for life, with like remainder to his sons in tail, remainder to *Philip Scott* for life, with like remainder to his sons in tail, remainder to her own right heirs; and there was a direction in the will that the possessor of the estate should take the name of *Ord*. The testatrix died in 1777, and thereupon *John Scott* was admitted, and afterwards died without issue.

On the death of *John Scott*, *William Scott* became seised of the copyhold, and took the name of *Ord*.

On 31st December, 1801, he was admitted tenant for life, and on 5th November, 1832, he died without issue.

*Philip Scott*, the third tenant for life, having died in the lifetime of *William Scott Ord*, without issue, the copyhold, on the death of *William Scott Ord*, descended upon the right heir of *E. Armstrong*.

On the 20th June, 1835, *Richard Errington* claimed to be such right heir; attended a manor court, and offered to prove that he was the right heir of *E. Armstrong*, and the



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homage found him to be right heir, but the steward refused to admit him.

The affidavit of the steward (who became such in 1834,) in answer, admitted that the homage had found *Richard Errington* to be the right heir of the testatrix, but stated that the evidence offered by the prosecutor was, in his opinion, not conclusive.

It further stated, that it appeared by the court rolls, that *William Scott Ord* was admitted, not as tenant for life only, but pursuant to the limitations, and with such remainders over as were contained in *E. Armstrong's* will; and that on the 5th October, 1809, *William Scott Ord*, after the death of *Philip Scott*, had claimed to surrender as right heir of *E. Armstrong*, to the use of his will, and had been allowed by the homage to make a surrender accordingly.

It also appeared, that at the same manor court at which the homage had found *Errington* to be the right heir of *Elizabeth Armstrong*, *Barbara* and *Elizabeth Pool* claimed to be admitted as devisees under the will of *W. Scott Ord*, and were subsequently, on 14th October, 1835, admitted. The steward's affidavit also stated, that where there is a surrender to the use of a will, and a devise by the surrenderor, the custom of the manor was to admit the person claiming under the devise, in preference to a party claiming as heir at law.

*J. Bayley* now shewed cause. As the term for ninety-nine years was still outstanding, the heir at law could not claim. [Lord *Denman* C.J. That term was determined by force of the proviso for cesser.] It cannot be contended, after *Rex v. The Brewers' Company* (a) and *Rex v. Wilson* (b), that an heir is not entitled to this writ, but this case is distinguishable. Here, the heir's title is denied, and *W. Scott Ord* has already been allowed by the homage to surrender to the use of his will as the right heir of *Elizabeth Armstrong*. It is true the homage have found the prose-

(a) 4 Dowl. & Ry. 492; S. C. *Day*, Gilbert's Equity Cases, 77.  
 2 B. & C. 172; and see *Mason v.* (b) 10 B. & C. 80.

cutor to be the heir of *Elizabeth Armstrong*, against the opinion of the steward, but they also have found *William Ord* to have been heir, and the *Pools* to be devisees under his will. It is not usual to admit two parties as tenants to the same copyhold. Assuming that it is, admission is not necessary to enable the prosecutor(a) to try his right in his claim as heir at law. When a party is both devisee and heir at law, he is in by descent, and is obliged to claim as heir at law.

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*W. H. Watson* contra. All that is required, is an opportunity to try the right to the tenements. The steward, by preferring the claim of one party to the other, completely excludes the latter from trying the right. [Lord Denman C.J. Have you a clear authority that a steward may admit two parties to the same copyhold, who claim by different titles?] It must occur frequently in practice; for when two parties claim a right to a copyhold, not as heirs, they cannot sue or be sued without admission. [Coleridge J. Does your client claim as heir or as devisee?] As devisee under the will of *Elizabeth Armstrong*. The rule, that where a party can take either as heir or devisee, the law requires him to take as heir, applies only to freeholds (b).

LORD DENMAN C.J.—I think you are entitled to have this rule made absolute, although I should like to have seen a case in which two tenants, on different titles, had been admitted, but I think on principle, the writ should issue, as otherwise it would follow, that the steward, by refusing to admit one of the contesting parties, might shut him out from making his claim.

COLERIDGE J. concurred (c).

Rule absolute.

(a) See *Doed. Milner v. Brightwen*, 10 East, 583, and the authorities collected 1 in *Scriv. on Copy*. 357, in notis, 2d ed.

(b) The 3 & 4 W. 4, c. 106, s. 3, enacts, that heirs entitled to lands under a will shall take as

devisees, where the testator shall die after 31 Dec. 1833; and sect. 1, explains "lands" to apply to lands held by freehold, copyhold, or any other tenure.

(c) *Patteson J.* and *Williams J.* had left the Court.

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Where an office is full by the appointment of the person who *prima facie* has the right of appointment, and where there are means of trying the title by action, this Court will not grant a mandamus against the party filling the office, in order to try the title.

*Quere*, whether an information in the nature of a *quo warranto* will lie for the usurpation of the office of sexton.

The KING v. The Minister and Churchwardens of STOKES  
DAMEREL.

IN Hilary term last *Erle* obtained a rule calling upon the minister and churchwardens of Stoke Damerel to shew cause why a mandamus should not issue, directed to them, to convene a vestry meeting within the parish, to fill the office of sexton. This rule was obtained upon affidavits, which stated the following circumstances. In October, 1835, the office of sexton, which is an office of considerable profit, and held for life, became vacant by the death of *John Garland*. The election to the office is by ancient usage, vested in the parishioners in vestry assembled, and *Garland*, in accordance with that custom, had been elected by the parishioners. Several applications were made to the curate and the churchwardens of the parish, to convene a vestry for the purpose of proceeding to the election of a proper person to be sexton, in conformity with the ancient usage; they refused to convene a meeting; and Mr. S., one of the churchwardens, claimed to be sexton by virtue of an appointment made by the rector of the parish, and he now wrongfully exercised the functions of the office.

The affidavits filed in opposition to the rule stated, that the right of electing a sexton was not in the inhabitants of the parish, but in the ordinary, or rector, officiating minister, or some other person having ecclesiastical jurisdiction, and that *John Symons*, an inhabitant of the parish, had been appointed by the rector, who was resident abroad.

The affidavits contained contradictory statements as to whether *John Garland*, the former sexton, and his two predecessors, had been appointed by the rector or the parishioners.

Sir *W. W. Follett* and *Crowder* now shewed cause against the rule. Such an application as this is wholly unprecedented. [Lord *Denman* C. J. Would a *quo warranto* lie

for this office? *Patteson J.* There are many cases in which, although a quo warranto will not lie, the Court will grant a mandamus, as in the case of a void election.] Assuming that an information in the nature of a quo warranto will not lie, yet a mandamus ought not to issue, since the parties have another remedy; any parishioner may try the title to the office, by refusing to pay the fees. Besides, as the office is full by the appointment of the person who *prima facie* has the right of election, this Court will not interfere. In an *anonymous* case in *Strange (a)* this Court refused to grant a mandamus to hold a vestry for the election of churchwardens, saying that they could not take notice who had the right to call a vestry, and consequently did not know to whom it should be directed. [*Coleridge J.* Who has the power of convening a vestry?] The churchwarden, with the consent of the minister. It is wholly unprecedented to grant a mandamus to elect. [Lord *Denman C. J.* The object of the mandamus is to convene a meeting, not to direct who is to be elected. *Patteson J.* In the case in *Strange (a)* the object of the meeting was to elect a churchwarden. It does not follow that the churchwardens have not the power to convene a meeting to elect another officer.] The application was made to the churchwardens alone. There was no application to concur with the rector, and it appears from *Dawe v. Williams (b)* that the right of convening a vestry is in the churchwardens, with the concurrence of the minister.

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The Court called upon *Erle* to support the rule.

*Erle.* By the canon law the right of convening a vestry is in the churchwardens, and there has been a direct refusal on their part to convene a vestry. In *Dawe v. Williams (b)*, it is said, by Sir *John Nicholl*, that the churchwardens, with the consent of the minister, have a right to convene vestries for "church matters;" but it is not to be inferred from that, that the minister's concurrence is necessary, where the

(a) 2 Str. 686.

(b) 2 Addams Eccl. Rep. 130.

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meeting is to be held for a totally different purpose. *Rex v. St. Margaret's, Westminster* (a) shows that the Court will issue a mandamus to churchwardens under some circumstances to convene a meeting of the parishioners. [*Patteson* J. The office is full, by the appointment of the person who ordinarily has the right of appointment. It lays upon you to make out a very strong case as to the invalidity of the appointment.] The affidavits shew that the right to elect is in the rate-payers and not in the minister. It is clear from *Rex v. Ramsden and others* (b) that this is not such an office as an information in the nature of a quo warranto would lie for the usurpation of it. An information in the nature of a quo warranto will only lie either where a franchise of the crown is usurped, or the public at large are interested in the office; *Selwyn's Nisi Prius*. (c)

It is said, that a mandamus ought not to be granted, because there is another remedy, and that any parishioner may raise the question as to the title to the office, by refusing to pay the fees. The sexton may, however, knowing that his title is bad, refrain from bringing any action for his fees, or even from insisting on the payment of them, until all recollection of the former appointments has passed away. The common mode of trying the right to an office of this description is for each claimant to be admitted, and then the one brings against the other an action for the fees received by him. It is shewn that this is an office held for life, and one of great emolument.

Lord DENMAN C. J.—There were several difficulties in the way of coming to the question here, which now seem to me to be removed. I rather think the refusal on the part both of the minister and churchwardens is a sufficient refusal, and that where the inhabitants at large, or a considerable portion of them, wish to have a vestry called, and the refusal is made, that it may be very reasonable to direct a mandamus, not to the inhabitants themselves, but to the

(a) 4 M. & S. 250.

(c) Title Quo Warranto, 1156, 8th ed.

(b) 5 N. & M. 325.

churchwardens, to summon the inhabitants to the vestry in order to do the acts which the inhabitants wish to have done. Then the question arises whether this is a case in which a mandamus ought to issue. In the first instance it appeared to me there was no proof at all of any custom to interfere with the usual right of the minister to appoint the sexton; but on looking at the affidavits more closely it does appear that there is *some* evidence to that effect.

The office is already full, and it is filled by the appointment of that person who, by the ordinary course of law, has the power of appointing to it. The minister has appointed a sexton, and the inhabitants think they have the right of appointment. Unless there is a very strong case indeed to shew that the present appointment is void, we ought not to issue the writ. That is not, in my opinion, sufficiently made out. Besides, it should be shewn that there is no other remedy. I think there is another remedy. We cannot enter into the consideration whether it would be more or less likely that the present holder of the office will abstain from receiving his fees. There is clearly a mode by which any parishioner, who is unwilling to recognize the title of the present officer, may dispute his right to the office, by refusing to pay the fees. On the other hand, if the fees are paid and received, the parishioner paying them may bring an action against the present sexton, for having improperly extorted money under colour of an office which he has no right to fill. We must take for granted that officers will insist upon receiving what is due to them for fees. There, therefore, is a better and more convenient remedy. As we ought not to give the sanction of our authority on any supposed custom, interfering with the usual right of appointment, and as we are not in the present instance convinced of the existence of the custom, this rule must be discharged.

PATTESON J.—I am entirely of the same opinion. I think all the minor points are removed in this case; and it comes to the question whether, when the office of sexton is

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filled by the appointment of a person to it by the rector, the Court will interfere by mandamus. I have not been able to find any case in which it has been decided that a mandamus will lie to elect, when the office is already full, by what is called a void election. But my recollection is, that many such motions have been made; and although I cannot find any report of the cases, I am confident the practice has been, whenever the office is such that the right to it cannot be tried by quo warranto, that the Court, if they are satisfied on application that the election to the office is a void election, will so treat it, and issue a mandamus to proceed to a new election. There is a case of *The King and The Corporation of Bedford* (a), in which the Court did direct a mandamus for a new election, on the ground that there had been a mayor elected, who had not qualified; the Court ordered the new election, but expressed very great doubt whether they were right or not in so ordering it. That is the only case I have at the moment been able to find (b).

I do not think that that remedy can be applied, however, except where the Court is fully satisfied that the first election is void, and there is no other mode of trying the question. In this case, *prima facie*, the appointment by the rector is the right appointment. Then it is said there is a custom in the parish for the inhabitants in vestry to elect the sexton—and of that custom some evidence appears to be given by the affidavits. The office, however, is full by the appointment by the rector. Under these circumstances, I should say, if there was no other remedy, we should, perhaps, grant a mandamus; but it appears to me there clearly is another remedy, either by refusing to pay the sexton's fees, who is in possession of the office *de facto*, and thus compelling him to bring an action, or paying them under protest, and bringing an action for money had and received

(a) 1 East, 79.

*Bedford Level Corporation*, 6 East,(b) See *Rex v. Mayor of Cambridge*, 4 Burr. 2008; and *Rex v.* 356.

against him. That opportunity of trying the title to the office will doubtless occur before long. It is scarcely to be supposed that the sexton will go on for five or six years receiving nothing from his office, merely for the sake of preventing persons proving he has no right to it. We cannot consider the probability of this, and as there is another remedy, the rule must be discharged.

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WILLIAMS J.—I am entirely of the same opinion. I shall not attempt to add to the grounds that have been already stated by my Lord and my brother *Patteson*. It seems to me there is, beyond all question, another remedy. That other remedy has been pointed out already, namely, an action for money had and received, if the fee is paid, the payment being made under protest, or a resistance of the fee, supposing the sexton endeavours to recover it for the ordinary work done by him as a sexton. I never can believe he will continue to work for nothing, or that he has sought to be appointed on any such ground.

COLERIDGE J.—I assume, in giving my opinion, that a mandamus would lie for an office of this description, and I assume also, for the purposes of this case, that a *quo warranto* would not, without thinking it necessary to decide either the one point or the other. Still I think, under the particular circumstances of this case, we ought not to grant the mandamus, and the ground on which my opinion rests is very much that which has been stated by the rest of the Court. This office appears to be full, and it may be taken to be full by the appointment of him in whom, *primâ facie*, the right to appoint rests. I do not mean to say the affidavits do not bring that right in some degree in question, but the balance upon the whole, if I were to give my opinion on the facts as stated in the affidavits, is rather in favour of the right.

However, the office being full by the appointment of him who, *primâ facie*, has the right to appoint, I should



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expect to see the balance very clearly the other way; indeed so as almost to satisfy my mind the appointment was void, before I should think it right to issue a mandamus, if there be any other common law mode by which the right can be tried. I am satisfied in this case there is another mode, and although it has been said (and it is possible) that it may not be so convenient, because it will lay in the power of the sexton, who fills the office, to suspend for a time the operation of that right, by not calling for his fees, so as to put it out of the power of any one for a certain length of time to try it, I do not think that is a state of things we can contemplate as reasonably likely to happen; if in truth the parishioners have, as they say they have, a right to make the appointment, I think we must take it for granted they will shortly have the means of bringing that into litigation.

Rule discharged, without costs.

Thursday,  
Nov. 10th.

ROBERT HART, Esq. v. The Reverend GEORGE WATKIN  
MARSH.

Where in a suit in an ecclesiastical court the libel contained several articles, some of which comprised articles conusable at common law, but which were not objected to by the defendant during the progress of the suit, and the Court in their sentence found that the articles were for the most part proved, and did not particularize in respect of which articles the sentence was pronounced, a prohibition does not lie.

If the prohibition had been applied for before sentence pronounced, such of the articles only would be removed as contained matter conusable at the common law. Per *Patteson J.*

*V. RICHARDS*, in Hilary term last, had obtained a rule calling upon the promoter to shew cause why a writ of prohibition should not issue to the Consistory Court of Hereford, and to the Arches Court of Canterbury, to prohibit the said Courts from further proceedings in the suit between the above parties. Upon the affidavit of the defendant's proctor it appeared, that the defendant was rector of Hope Bowdler, in the county of Salop, and that the promoter of the suit, who was churchwarden of that parish, had libelled him in the Consistory Court of Hereford for divers offences, on which the Court had pronounced sentence of suspension, from which the defendant had

appealed to the Court of Arches. The sentence of the Consistory Court, after reciting that the articles exhibited by the promotant were for the most part sufficiently proved, proceeded in the following terms:—"We do pronounce, decree, and declare, that the said articles, heads, positions, and interrogatories, given in and admitted in the said cause as aforesaid, are for the most part sufficiently proved and substantiated." The affidavit of the defendant thereupon suggested that many of the articles alleged against the defendant were cognizable only by the common law, and not in the ecclesiastical courts; and that the official of the Consistory Court had not particularized in respect of what articles the sentence had been pronounced, and that in no part of the sentence did it appear that the official had confined himself to any one or more of the articles, but that he had taken cognizance of the whole. It further suggested that the defendant had lodged an appeal in the Arches Court of Canterbury from the above sentence. By the affidavit of the promoter's proctor it appeared, that the defendant had upon several occasions attended the Consistory Court of Hereford pending the suit, and well knew the contents of the articles exhibited against him, and that the said articles were admitted at a Consistory Court of Hereford by the consent of the proctor of the defendant, of which an entry was made in the act book of the said Court.

There were 31 articles exhibited in the suit, of which the 1st, 15th, and 16th were as follows:—

1st. We article and object to you, the said *George Watkin Marsh*, that by the ecclesiastical laws, canons and constitutions of the Church of England, all clerks and ministers in holy orders are particularly enjoined and required to be grave, decent, reverend and orderly in their general deportment and behaviour in every respect, and to abstain from fornication or incontinence, profaneness, drunkenness, lewdness, assaultings, quarrelling, fighting, profligacy, or any other excess whatever, and for being guilty of any indecency themselves, or encouraging the same in others;

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and furthermore, they are enjoined and required to abstain from resorting to any taverns or alehouses, and not to give themselves to any base or servile labour, nor to drinking or riot, nor to absent themselves from their benefices without supplying curates that are sufficient and licensed preachers, and are also enjoined and required to visit the sick, and to instruct and comfort them in their distress, and not to forsake their calling and use themselves in the course of their lives as laymen; but that, on the contrary, they are enjoined at all convenient times to hear and read some of the Holy Scriptures, or to occupy themselves with some other honest study or exercise, always doing the things which shall appertain to honesty and endeavouring to profit of the Church of God; bearing in mind that they ought to excel all others in purity of life, and to be examples to other people under pain of deprivation of their ecclesiastical benefices, suspension from the exercise of their clerical functions, or such other ecclesiastical punishment or censures as the exigency of the case and the law thereupon may require and authorize, according to the nature and quality of their offences. And this was and is true, public and notorious, and so much you, the said *George Watkin Marsh*, do know, or have heard, and in your conscience believe to be true, and we article and object to you of any other time, place, person or thing, or everything in this and the subsequent articles contained, jointly and severally.

15th. Also we article and object to you, the said *George Watkin Marsh*, that in the years 1819, 1820 and 1821, or in three, two or one of such years, you carried on the trade or business of a maltster in a malthouse in the town of Church Stretton, in the county of Salop, within the diocese of Hereford; and that you thereby unlawfully gave yourself up to loose and servile labour. And that this was, and is true, public, and notorious, and we article and object to you as before.

16th. And we article and object to you, the said *George Watkin Marsh*, that at the time you carried on the trade

or business of a maltster, as stated in the next preceding article, you also carried on and exercised the trade or business of a flannel manufacturer at a place called Church Stretton Carding Mill, in the parish of Church Stretton, in the county of Salop, and within the diocese of Hereford, and that you also bought and sold wool of profit and gain, and thereby exercised yourself in the course of your life as a layman. And this was and is, &c.

The 17th article objected that the defendant had occupied and tilled a farm of 200 acres and upwards, without the leave of the bishop.

*Maule and Cleasby* now showed cause. The defendant has been proceeded against as a beneficed clerk with a view to deprivation, and to such an end an ecclesiastical court only has jurisdiction. In *Free v. Burgoyne* (a), Lord Tenterden C. J. said, "We think, therefore, that as to the charge of incontinence, the ecclesiastical court may proceed for the purpose of deprivation." It is no ground for a prohibition that some of the articles contain matters consonable at common law, for there are many offences over which the canon and common law have a concurrent jurisdiction. Thus, in cases of felony clerks are proceeded against in the ecclesiastical court for deprivation of their benefices, though their temporal punishment is by indictment at common law (b). The articles objected to, probably, are the 15th, 16th, and 17th, for carrying on trade as a maltster and flannel manufacturer, and for farming land without the leave of the bishop, which are offences in a clerk provided against by 57 Geo. 3, c. 99. But the first article sets out, that by the *ecclesiastical canons*, clerks are enjoined not to give themselves to any servile labour, and not to use themselves in the course of their lives as laymen; the 15th, 16th and 17th articles therefore are clearly founded on breaches of the canon law. Thus, the 15th article sets out, that defendant had carried on trade as a

(a) 5 B. & C. 400. (b) *Slader v. Smalbrooke*, 1 Lev. 138; S. C. 1 Sid. 217.

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malster; but the objection is, that he had thereby given himself up to base and servile labour. So the 16th and 17th articles conclude by objecting that he has used himself in the course of his life as a layman, and forsaken his sacred calling of a minister. All those are offences against the canon law, and follow the very words of the canons in which they are forbidden (*a*). The 57 Geo. 3, c. 99, s. 83, provides expressly that nothing in the act "shall be deemed, construed, or taken to derogate from, diminish, prejudice, alter, or affect, otherwise than is expressly provided, any powers, authorities, rights, or jurisdiction already vested in or belonging to any archbishop or bishop, under or by virtue of any statute, canon, usage, or otherwise howsoever," which shews that the statute was not meant to abrogate the jurisdiction of the bishop, but only to add temporal penalties in certain cases. In *Burn's Ecc. Law* (*b*) there is an express authority to shew, that when the ecclesiastical court proceed on their own canons, they are not to be controlled by the common law, unless they act in derogation from it. In this case, the proceeding is entirely on the canon, in order to obtain deprivation, and *Slader v. Smalbrooke* (*c*) decides, that when that is the object in the ecclesiastical court, prohibition does not lie; it is therefore no objection that some of the offences charged are punishable in the temporal courts; and although the offence charged were punishable in the temporal and not in the spiritual court, if deprivation only was sought the prohibition would not go; *Townsend v. Thorpe* (*d*). It is, besides, incumbent on the other side, when a prohibition is applied for *after* sentence, to shew *clearly* that the spiritual court had no jurisdiction. *Carstake v. Mapledoram* (*e*)

(*a*) Can. 1603, c. 75; Gibson Cod. tit. 7, c. 1, p. 162, 2d edit.

(*b*) 3 Burn's Eccl. Law, 219, pl. 2, 8th edit. Proh. 2.

(*c*) 1 Lev. 138; S. C. 1 Sid. 217.

(*d*) 2 Lord Raym. 1507.

(*e*) 2 T. R. 473.

*V. Richards.* Some of the charges in the articles are of common law cognizance only; and it is quite consistent with the vague terms in which the sentence is drawn up, that the common law charges only were proved. That being so, the court was without jurisdiction, and a prohibition may go after sentence. *Offley v. Whitehall (a)*, *Leman v. Goulty (b)*. The question for the Court therefore is, whether any of the articles are such as the ecclesiastical court cannot recognize. By the stat. 21 *Hen. 8*, c. 13, s. 1, it is provided that no spiritual person shall farm land for term of life, years, or at will, under the penalty of forfeiting 10*l.* for every month he occupies the farm. And section 5 provides, that no spiritual person shall buy and sell in the way of merchandize, under penalty of forfeiting treble value, and the bargain to be void. Before that act passed, those offences were cognizable only by the ecclesiastical law, but that statute gave the jurisdiction to the temporal courts. It is true, that statute is repealed by the 57 *Geo. 3*, c. 99, but it is also re-enacted in spirit by it.

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LORD DENMAN C. J.—Supposing, for a moment, the articles as to carrying on trade contain charges cognizable only at common law, still there are several other articles clearly within the ecclesiastical jurisdiction, the most part of which the Court has found to be proved, and upon that finding has proceeded to sentence. In order to get rid of the sentence of the ecclesiastical court, it is necessary to shew that the Court had no jurisdiction at all to pronounce that sentence; but nothing of the kind has been shewn here; on the contrary, it is apparent that there were certain articles only, which, if specially objected to, might perhaps have been withdrawn from the spiritual cognizance. Those articles however were not objected to by the defendant when the libel was exhibited, and it is quite consistent with the sentence pronounced, that no evidence whatever might

(a) Bunb. 17.

(b) 3 T. R. 3.

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have been given upon them, or even that the defendant might have been acquitted of the charges therein propounded. We see therefore no reason for granting a prohibition.

PATTESON J.—It is laid down in several cases, and is not denied in the argument, that prohibition may go after sentence if there is a clear want of jurisdiction. Assuming for a moment that some of the articles in question are not within the jurisdiction of the ecclesiastical court, and that a suggestion to that effect had been made to this Court before sentence, prohibition even then would not have gone to remove the whole suit, but only those articles which charge matter cognizable by the temporal courts. But after sentence, the onus of shewing the ecclesiastical court has proceeded on that part of the libel containing common law charges, lies on the party applying for the prohibition. There is nothing to shew here that the sentence did so proceed; but the ground of the application is, the uncertainty as to which of the articles the Court found to be proved before them. That is not sufficient, it should be made to appear clearly, that the sentence of the Court was founded on that part of the libel without their jurisdiction.

COLERIDGE J. concurred (a).

Rule discharged with costs.

(a) *Williams J.* had left the Court.



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The KING v. The Churchwardens of ST. MICHAEL'S,  
PEMBROKE.

Thursday,  
Nov. 10th.

SIR W. W. Follett had obtained a rule in Hilary term last, calling on the churchwardens of St. Michael's, Pembroke, to show cause why a writ of mandamus should not issue directed to them, commanding them to pay to *Ann Morgan* the instalments which had become due of the sum of 1000*l.* borrowed by the churchwardens of the said parish, and also the arrears of interest due thereon; or to raise by rate a sufficient sum of money, and pay as well the instalments due of the principal sum of 1000*l.*, and also the arrears of interest due thereon, and to pay the amount so raised to the said *Ann Morgan*.

It appeared by the affidavits that the churchwardens of St. Michael's, Pembroke, had borrowed from Miss *Morgan*, in 1830, the sum of 1000*l.* in pursuance of the provisions of the act for building new churches (*a*), in order to rebuild a church, which money was secured to her by a mortgage of the church rates of the parish. The mortgage deed, after reciting the provisions of the act authorizing the churchwardens "to borrow and raise, upon the credit of the church rates, such sum or sums of money as should be necessary for defraying the expenses, or any part of the expense, of taking down and rebuilding such churches, and to make rates for the payment of the interest of such sum or sums of money to be borrowed and raised, and for providing a fund of not less than the amount of the interest of the sum advanced, for the repayment of the principal thereof; or for repaying such principal, in such manner and at such times, and in such proportions as should be agreed upon with the person advancing any such money,"—stated an

The 59 Geo. 3. c. 134, s. 40, authorizes churchwardens, for the purpose of rebuilding or enlarging parish churches, to borrow money upon credit of the church rates, and to make rates for payment of the interest of the sum borrowed, "and for providing a fund of not less than the amount of the interest of the sum advanced, for the repayment of the principal thereof; or for repaying such principal in such manner, and at such times and in such proportions as shall be agreed upon with any person advancing such money."

1. *A.* lent to the churchwardens of *B.*, under the above act, 1000*l.* at 5*l.* per cent., and agreed not to

(*a*) 59 Geo. 3, c. 134.

call in the principal for twenty years :—Held, that the act was compulsory on the churchwardens to raise annually a sum equal to the amount of the interest, as a fund for the repayment of the principal, although *A.* could not compel the repayment of the principal until the expiration of the twenty years.

2. The churchwardens may use the fund raised annually for the liquidation of the principal, for the benefit of the parish. Per Lord Denman C. J.



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agreement by *Ann Morgan* that the said principal sum should not be called in and paid off before the expiration of twenty years from the day of the date of the mortgage deed, unless the churchwardens should be desirous of paying off the same at any time before, or as soon as a sufficient sum should be raised by means of the said rates or otherwise, and that in the meantime *Ann Morgan* should receive interest for 1000*l.* at the rate of five per cent. per annum.

It also appeared that one year's interest was due to *Miss Morgan*, and that no rate had been made for raising any part of the principal sum.

*Maule* now showed cause. The rule asks for too much. It is clear that *Miss Morgan* is not entitled to receive any instalments of the principal, as by her agreement she has consented to postpone the payment of it for twenty years. The churchwardens are not bound to make any rate now for the payment of the principal, since they are only bound to pay it off within the twenty years. If instalments of the principal were to be paid to her annually, with five per cent. interest on 1000*l.*, and twenty years consumed in paying her off, she would receive compound interest, and get back more than her principal. But the act does not mention annual payments of the principal. Section 14 of the act provides for part of the principal being paid off from time to time, but that clause relates to money raised for repairing churches, while section 40 leaves the payment of the principal to the agreement of the parties, where the money has been raised for the purpose of rebuilding a church.

*Miss Morgan* has no interest, therefore, in having the money raised before the end of the twenty years; and even if she had, she is too late in her application. It would be unjust to compel those individuals, who happen at this moment to be inhabitants of the parish, to raise 200*l.* or 300*l.* all at once.

Sir *W. W. Follett*, contra.—The agreement is, that the

principal money shall not be called in for twenty years, unless the churchwardens shall be desirous to pay it off, or as soon as a sufficient sum shall be raised by means of the rates; and it is contended, that, as the principal need not be paid off for twenty years, no rate need be made in the interval to provide a fund for paying it off. But the act clearly provides that a fund shall be raised of not less than the amount of interest (a); which means, no doubt, an annual instalment, and that instalment, it is submitted, should be paid to *Miss Morgan*.—[*Coleridge J.* What sense, then, do you put upon the agreement not to be paid off for twenty years?—Except for that agreement the money might be called in at any moment. At all events, a mandamus ought to issue to make a rate for providing a fund for the payment of the principal, although *Miss Morgan* be not entitled to receive the money when raised.

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**LORD DENMAN C. J.**—There is no doubt that a writ must go to command the churchwardens to make a rate for the payment of the interest, and I think it must also go to raise a fund towards the liquidation of the principal, as *Miss Morgan* is certainly much interested in a fund being provided for the liquidation of the principal. The word ‘annual’ indeed is not in the act, but, coupled as the paragraph is with the amount of interest payable on the principal sum, annual instalments, no doubt, are contemplated. With regard to the payment of the principal, she has postponed the payment of it for twenty years; it is, therefore, optional on the parties to pay her off at any time within that period, and I am of opinion that the churchwardens have the option of using the fund raised for the liquidation of the principal sum beneficially for the parish during that interval.

**PATTESON J.**—I am of the same opinion, but the writ must be modified, and must be drawn up to make a rate for the payment of the interest now due, and to pay it

(a) Section 40.

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over to Miss *Morgan*; and to raise by rate a sum equal to the amount of the yearly interest, from the time of the loan, to form a fund for the liquidation of the principal.

WILLIAMS J. and COLERIDGE J. concurred.

Rule absolute accordingly.

Friday,  
Nov. 11th.

Prohibition lies to the Consistory Court, if it proceeds to hear exceptions, at the suit of a legatee, to an inventory exhibited by an executrix.

GRIFFITHS and others v. ANTHONY and WIFE,  
in Prohibition.

*V. WILLIAMS*, in Michaelmas term last, had obtained a rule *nisi* for a prohibition to the Consistory Court of the Bishop of St. David's, on the behalf of the defendants, to prohibit the said Court from further proceedings in the suit between the above parties.

The grounds on which the rule was moved were disclosed in an affidavit by *Walter Anthony*, one of the defendants, viz. that the deponent and *Margaret* his wife, who was the executrix of her late father, were cited to appear in the Consistory Court, and exhibit an inventory of all the goods, &c. of the deceased, at the instance of *G.*, *T.*, and *P.*, legatees named in his will. Exceptions were filed to the inventory by the said legatees, and answers made on oath by the deponent and his wife were also filed, upon which the cause was set down for hearing in the said Court, and *the judge proceeded to examine witnesses* as to the truth of the inventory, and of the reply to the exceptions, and afterwards made a decree that the inventory was false and fraudulent, and that it was to be amended according to the judge's minutes.

*Chillon* now showed cause.—It must be admitted that *Henderson v. French*(a) is an authority to shew that the Ecclesiastical Court has no jurisdiction to hear exceptions to an inventory, and if that decision is to be maintained,

(a) 5 M. & S. 406.

the rule must be absolute. But a very different practice prevails in the Spiritual Courts. It is thus stated by Mr. *V. Williams* (a): "Notwithstanding these decisions of the Court of King's Bench, it has always been, and still continues the practice of the Prerogative Court of Canterbury, to entertain objections to inventories;" and he adds the authorities in a note. In *Hinton v. Parker* (b) it was held, that, though the Spiritual Court could not falsify an inventory at the suit of a creditor, at the suit of a legatee they might. The proceedings here are at the suit of legatees, which distinguishes the case from *Henderson v. French* (c), and *Hinton v. Parker* (b). There was no excess of jurisdiction by the Court, as the evidence to falsify the inventory was taken *viva voce* by consent, to save expense.

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*V. Williams*, *contra*, was not called upon by the Court.

LORD DENMAN C. J.—*Henderson v. French* (c) is a case quite in point not to be got over; there does not appear to be the least distinction in principle between a legatee and a creditor.

PATTESON J.—There are two other cases just like this, one in *Burrough's Reports* (d), and *Bewicke v. Ord*, referred to in the same report.

WILLIAMS J. and COLERIDGE J. concurred.

#### Rule absolute (e).

(a) 2 *V. Will.* Exec 646.

(b) 8 Mod. 168.

(c) 5 M. & S. 406.

(d) *Catchside v. Ovington*, 3 Bur. 1922.

(e) It would seem that the decision in this case must take away the jurisdiction Spiritual Courts have exercised in entertaining objections to inventories, unless the view taken of *Henderson v. French*,

and *Catchside v. Ovington*, by Sir *J. Nicholl*, in his judgment in *Telford v. Morison*, 2 Addams Reports, 319, again prevail with the judges of those Courts, viz. that the jurisdiction of the Spiritual Courts over inventories, and the effect of 21 Hen. 8, c. 5, s. 4, on that jurisdiction, have not yet been solemnly discussed before the Court of King's Bench.

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The 9 & 10 Will. 3, c. 15, and the 3 & 4 Will. 4, c. 42, apply to references of civil proceedings only. When criminal matters, therefore, are referred, the submission is revocable at common law.

The KING on the prosecution of GEORGE SHILLIBEE and WILLIAM MORTON v. JAMES BARDELL, JOSEPH BARDELL, THOMAS JOHN BOLTON, ROBERT TREVELL, and ten others.

THIS was an indictment found at the Middlesex sessions, 1833, against the defendants, for a conspiracy to obstruct the prosecutors in their business as omnibus proprietors. A certiorari having been obtained to remove the indictment into this Court, it came on for trial at Westminster, before Lord Denman C. J. at the sittings after Easter term, 1834, when, at the suggestion of his lordship, a juror was withdrawn, and all matters in difference between the parties were referred to a barrister. The order of reference was expressed to be by and with the consent of the parties, and the award was to be made on or before the 4th day of Trinity term then next, with power to the arbitrator to enlarge the time for making the award. The order of reference was drawn up and served on the prosecutors' attorney, but no appointment was taken out by him till the 17th Dec. 1835. In the meantime *Shillibeer*, the prosecutor, and all the defendants, except *Joseph* and *John Bardell*, signed the following agreement:—"We, the undersigned proprietors of omnibuses, do hereby agree to abide by the arbitration of two coach proprietors as to Mr. *Shillibeer's* claim to times on the road, and do hereby also pledge ourselves to carry into effect the result of such arbitration.—7th November, 1834."

The two coach proprietors, chosen in pursuance of the above agreement, made the following award on the 10th November, 1834 :—

"We, the undersigned, called upon to take into consideration the dispute between the Paddington omnibus proprietors and Mr. *Shillibeer*, have awarded him two times, to follow Mr. *Hill* his second journeys, and so to continue all the day, with a recommendation to the proprietors to take into their serious consideration the time now in the occupation of Mr. *Bardell*, belonging to Mr.

*Shillibeer*, that they should apply to Mr. *Bardell* for a remuneration for that time, or give it up."

*Shillibeer* took possession of the times on the road thus awarded him; but as the *Bardells* declined to act in pursuance of this award, the prosecutors took out an appointment to attend the reference before the barrister, on the 9th January, 1836, which was attended by the defendant's counsel, who refused to go on with the reference, and the arbitrator was served with a notice of revocation, signed by *Bolton*, and the attorney for all the defendants, except *Joseph* and *James Bardell*, and signed by their attorney also. The learned arbitrator being doubtful whether a submission was any longer revocable since the late statute(a), a rule nisi was obtained (b) in Hilary term last, calling upon the prosecutors and the arbitrator to shew cause why the arbitrator should not be restrained from further proceeding in the said reference, on the ground that his authority had been revoked.

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*Bompas* Serjt., and *Platt*, now shewed cause. The reference in this case, by an order of nisi prius, not being in an action, is contended by the defendants not to be within the operation of the 3 & 4 Will. 4, c. 42, s. 39. That section enacts, that the authority of any arbitrator, appointed in pursuance of any order of nisi prius in any action now brought, or which shall be hereafter brought, or in pursuance of any submission to reference, containing an agreement that such submission shall be made a rule of any of his majesty's courts of record, shall not be revocable by any party to such reference, without the leave of the Court by which such order shall be made, or which shall be mentioned in such submission, or by leave of a judge; and the arbitrator shall and may, and is hereby required to proceed with the reference, notwithstanding such revocation, and to make such award, although the person making such revocation shall not afterwards attend

(a) 3 & 4 Will. 4, c. 42, s. 39.

(b) Cor. *Patteson* J. in the Bail Court.

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the reference. The reference being made by the consent of the parties, clearly renders it an "agreement for a submission to reference," within the second branch of the section. The parties might have made this agreement per procuration, and the learned judge's order at nisi prius is only a more solemn expression of their intentions, giving additional authority to what the parties had agreed to do. It is, then, a clear submission to reference, and it has not been revoked; for what is called a revocation is signed by one calling himself the attorney of the parties, and is an act which, in a criminal case, the parties themselves only could perform.

*Sir J. Campbell A. G., Humfrey and Knowles, contra.* A submission of criminal proceedings to arbitration was clearly not contemplated by this act, for the first paragraph of the section relates only to proceedings in *actions* in Court, the second to proceedings in civil cases out of Court. This is a proceeding in Court, but not in an action, and if indictments had been intended to be included, an express provision for them would have been introduced into the act. The power at common law, therefore, of revoking the arbitrator's authority remains to the parties. [The Court intimated that they were of this opinion, but inquired what authority they had to prevent an arbitrator from making an award.] All that is required, is, an expression of the opinion of the Court.

Lord DENMAN C. J.—We are of opinion that a reference of an indictment is not within this act. This enactment seems to me to apply to two distinct specific and perfectly different states of circumstances (unfortunately, perhaps, not to indictments); to references made by order of nisi prius, in causes in Court, and to references by agreement of the parties out of Court. Here the reference was made by order of nisi prius, but not in an action to which the words of the statute are confined. It is true there was an agreement by the parties to refer, but we cannot help seeing that the

agreement spoken of in the act refers to civil proceedings not yet brought into Court.

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PATTESON J.—I have not the slightest doubt upon the point, and never had when it was before me in the other Court, although I thought it proper to have the matter considered. The 39th section of the 3 & 4 *Will.* 4, is plainly drawn to apply to actions, and not to indictments at all. The whole act is with relation to actions; and when I say actions, I mean civil cases. A reference is first mentioned in the statute where an action is pending, then it provides for a submission, containing an agreement, plainly pointing to the 9 & 10 *Will.* 3, c. 15, which is confined to civil cases. And although Mr. *Chitty* (a), in a note, appears to intimate that a reference of indictments might be made, under that act of parliament, it is not so, for where an indictment may be referred, it is at common law; and in all cases the statute of 9 & 10 *Will.* 3 is confined entirely to civil proceedings. The rule, however, must be discharged; for what power have we to restrain an arbitrator from doing what would clearly be a nullity if done.

WILLIAMS J.—I am entirely of the same opinion. I do not think that there is any doubt on the subject. And although it is not material for the decision of the case, I own I have some doubt whether even it was meant that indictments should come within the act. References of criminal proceedings are so unusual, that probably it was not contemplated by the legislature to include them.

(a) "Criminal offences, which are personal, such as assault, libel, conspiracy, nuisance, maintenance, and the like, for which an action of damages would lie, may, it is said, be submitted to arbitration. See 9 *East*, 497; 7 *Taunt.* 422; and if an indictment has been preferred in any such case, the matter of complaint may still be referred by leave of the Court; 11 *East*, 46. But if civil matters, wherein a cause is already pending in the Court, be referred, the case is not within the statute, but it rests upon the common law, the statute being confined to disputes in which no action has been commenced." 2 *Burr.* 702; 3 *East*, 603. 1 *Chit. Stat.* 33.



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COLERIDGE J.—I think it is quite clear, upon looking at the 39th section, that a distinction is made between the cases in which an action is brought, which were capable of being referred at common law, before the 9 & 10 Will. 3, and the cases made referable by that statute, viz. disputes in civil matters, in which no action had been commenced. But a reference of criminal proceedings falls under neither one category nor the other.

Rule discharged.

Friday,  
 Nov. 11th.

REX v. CHITTY.

A bankrupt uncertificated at the time of election is not disqualified from being elected a councillor, under the Municipal Corporation Act. The disqualification exists only where the bankruptcy occurs during the holding of the office.

IN Hilary term last Sir *J. Campbell* A. G. obtained a rule calling upon *Philip Mathews Chitty* to shew cause why an information in the nature of a quo warranto should not be exhibited against him, to shew by what authority he claimed to be a councillor of the borough of Shaftesbury, in the county of Dorset, on the ground that at the time of his election he was an uncertificated bankrupt. It appeared from the affidavits, that on the 20th December, 1835, an election of councillors for the borough of Shaftesbury, in the county of Dorset, took place, pursuant to an order in council of the 11th September, 1835. On the 28th December following Mr. *Chitty* was declared to be duly elected one of the councillors of the borough, and on the 31st of December he made and signed the declaration required by the Municipal Corporation Act. On the 10th of November, 1832, a fiat in bankruptcy had been duly awarded and issued against Mr. *Chitty*, and at the time of his election he was an uncertificated bankrupt. The borough of Shaftesbury is not divided into wards: during the years 1833, 1834, and up to 1st August, 1835, inclusive, Mr. *Chitty* was duly rated, and had paid the rates in respect of a house of the value of 30*l.*, situated in the borough. His name also appeared on the Burgess Roll.

*Erle* now shewed cause. *Mr. Chitty* was at the time of election duly qualified in every respect, unless the circumstance of his being an uncertificated bankrupt at the time of election disqualified him. The question turns upon the 28th (a) and 52d (b) sections of the Municipal Corporation

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(a) Sect. 28. That no person, being in holy orders, or being the regular minister of any dissenting congregation, shall be qualified to be elected, or to be a councillor of any such borough, or an alderman of any such borough, nor shall any person be qualified to be elected or to be a councillor, or an alderman of any such borough, who shall not be entitled to be on the burgess list of such borough, nor unless he shall be seised or possessed of real or personal estate, or both, to the following amount, that is to say, in all boroughs directed by this act to be divided into four or more wards, to the amount of 1000*l.*, or be rated to the relief of the poor of such borough, upon the annual value of not less than 30*l.*, and in all boroughs directed to be divided into less than four wards, or which shall not be divided into wards to the amount of 500*l.*, or be rated to the relief of the poor in such borough, upon the annual value of not less than 15*l.*, or during such time as he shall hold any office or place of profit, other than that of mayor, in the gift or disposal of the council of such borough, or during such time as he shall have directly or indirectly, by himself or his partner, any share or interest in any contract or employment, with, by, or on behalf of such council; provided that no person shall be disqualified from being a councillor

or alderman of any borough as aforesaid, by reason of his being a proprietor or shareholder of any company, which shall contract with the council of such borough, for light, or supplying with water, or insuring against fire any part of such borough.

(b) Sect. 52. That if any person holding the office of mayor, alderman, or councillor, for any borough, shall be declared bankrupt, or shall apply to take the benefit of any act for the relief of insolvent debtors, or shall compound by deed with his creditors, or being mayor, shall be absent for more than two calendar months, or being alderman or councillor, for more than six months at one and the same time, (unless in case of illness,) from the borough of which he shall be mayor, alderman, or councillor, then and in every such case such person shall thereupon immediately become disqualified, and shall cease to hold the office of such mayor, alderman, or councillor, as aforesaid, and in the case of such absence shall be liable to the same fine, to be recovered in the same manner, as if he had refused to accept the said office; and the council shall thereupon forthwith declare the said office to be void, and shall signify the same by notice in writing, under the hands of three or more of them, countersigned by the town clerk, to be

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Act(a). The first twenty-four sections of that act relate mainly to the burgesses of the borough. The 25th section directs the mayor, aldermen, and councillors, to be chosen in every borough, who, together, are to constitute the council; and the 28th sect. specifies who shall be qualified to hold the office of mayor and councillor. No person in holy orders, no minister of any dissenting congregation, no person who shall not be entitled to be on the burgess list, no person, who in all boroughs directed by the act to be divided into four or more wards, shall not be possessed of real or personal estate to the amount of 1000*l.*, or be rated to the relief of the poor to the annual value of not less than 30*l.*; and in all boroughs directed to be divided into less than four wards, or which shall not be divided into wards to the amount of 500*l.*, or be rated to the relief of the poor in such borough, upon the annual value of not less than 15*l.* The qualification, therefore, for a councillor of the borough of Shaftesbury, which is not directed to be divided into wards, is either the possession of real or personal property to the amount of 500*l.*, or the being rated to the amount of 15*l.* Mr. Chitty possesses the latter qualification, since he has been rated for a house of more than the annual value of 15*l.* Reliance is placed on the 52d section, which declares, that “*if any person holding office*” shall be declared bankrupt, or shall apply to take the benefit of any act for the relief of insolvent debtors, or shall compound by deed with his creditors, then such person shall thereupon immediately

affixed in some public place within the borough, and the said office shall thereupon become void; but every person so becoming disqualified and ceasing to hold such office, on account of his being declared a bankrupt, or of his applying to take the benefit of any act for the relief of insolvent debtors, or having compounded with his creditors as aforesaid, shall, on obtaining his certificate, or on

payment of his debts in full, be capable (if otherwise qualified) of being re-elected to hold such office, and every person becoming disqualified to hold such office, on account of absence as aforesaid, shall, on his return to such borough, be capable of being re-elected to such office, provided he shall then be otherwise qualified.

(a) 5 & 6 Will. 4, c. 76.

become disqualified. But this section relates only to the case of a person becoming a bankrupt whilst he holds office. It is reasonable if a councillor become bankrupt whilst in office, that his constituents should have the opportunity of electing another individual. A person, who is made bankrupt before the election, may become so from no fault of his own, and it is not unreasonable that his fellow townsmen should have the opportunity of electing such a person, if they think proper. If a contrary construction is put upon this section, not only all persons who ever have been bankrupt, but all persons who have at any time compounded with their creditors, will be disqualified. A person who may early in life have been under the necessity of compounding with his creditors, may at a later period be a person not only of respectability but of property. If a member of parliament accepts an office under the crown, his seat is vacated; but a person, already in possession of an office under the crown, is not disqualified from being elected to a seat in parliament. The legislature had this case under contemplation when this provision was inserted; and it is therefore declared, that bankruptcy during office shall disqualify. The 28th section mentions the persons qualified. Mr. *Chitty* is one of those persons. The 52d section enumerates the cases of disqualification, and this case does not fall within any of them.

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Sir *J. Campbell* A. G. If there is any doubt on the question, the rule ought to be made absolute, in order that it may be solemnly considered, and the opinion of a Court of Error taken upon it. It is evident, from a perusal of the 28th and 52d sections of the act, that the legislature intended that an uncertificated bankrupt should not be qualified to hold the office of councillor. The 52d section provides not only that if a person becomes bankrupt, he shall be disqualified and cease to hold the office, but that he shall not be capable of being re-elected, until he has obtained his certificate. The 28th section states what shall

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be the qualification of a councillor. He must either be possessed of a certain amount of property, or be rated for a house of a certain annual value. Rated, must mean rated for a house which really belongs to the party. An uncertificated bankrupt occupies a house by sufferance only; it does not belong to him. It was evidently intended by the 28th section, that the person eligible for the office of councillor should be possessed of some property. Then the 52d section declares, that an uncertificated bankrupt shall not be re-elected. Surely, taking the two sections together, the legislature have declared their intention that an uncertificated bankrupt shall not be elected at all. There is no reason which applies to the disqualification of an uncertificated bankrupt during office, which does not also apply to the disqualification of an uncertificated bankrupt before office taken.

Lord DENMAN C. J.—I agree with the attorney-general, if there is any doubt, this rule ought to be made absolute, that the question might be solemnly considered. I do not, however, entertain any doubt. We should not, in my opinion, be justified in drawing an inference of an intention to disqualify, when the disqualification is not expressly mentioned in terms. We are bound by the terms in which the act has declared what shall be disqualifications, and this person does not fall within any class enumerated. It is ingeniously argued, the intention of the legislature must have been, that the party qualified should be rated for a house that belongs to him, and that no house can belong to an uncertificated bankrupt. Without entering into that question, it is enough for us to abide by the words of the statute, and to say that as this party is rated to the relief of the poor in the borough, to the annual value required by the act, he is not disqualified from holding the office of councillor. The argument on the 52d section may be strong to shew what the intention of the legislature was; but it certainly does admit of the answer, that when the change of circumstances takes place after

the election, it is reasonable that the electors should have an opportunity of again exercising their judgment. In the 28th clause, the original election is contemplated, and it is not there said that an uncertificated bankrupt shall not be eligible. It would have been easy to say so if such had been the intention of the legislature. It seems to me, therefore, there is no doubt upon the question.

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PATTESON J.—I am entirely of the same opinion. The attorney-general's argument with reference to the 28th clause is this—that clause requires, that a party to be eligible, should be rated to a certain amount: an uncertificated bankrupt cannot be rated at all, within the meaning of that clause, because a person who is to be rated to the relief of the poor to a certain amount, must be rated in respect of some property that belongs to him, and an uncertificated bankrupt can have no property. I do not see that that necessarily follows; but if such a construction were to prevail, it would follow also he would not have a right to be a burgess. Yet by sect. 9, every person who shall have occupied (without saying how, or in what right, occupied) a house, has a right to be a burgess; and according to sect. XI. every person who is an occupier has a right to be put on the rate. Supposing the assignees of an uncertificated bankrupt, who previously to his bankruptcy held a lease of a house, should make their election under the Bankrupt Act, and abandon the lease under which he held; then, if the lessor and the bankrupt should both remain quiescent, the contract would continue as before, and the party would occupy under the lease, although an uncertificated bankrupt. Without, however, entering upon such minute questions, it seems to me sufficient for us to say, that by the plain words of the 52d section the disqualification is confined to the case of a man becoming bankrupt, after he has been elected, and there are no other words of disqualification in the statute.

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WILLIAMS J.—I am of the same opinion. The words of the act of parliament are plain, clear, and distinct.

COLERIDGE J.—I am quite of the same opinion. I do not think we are at liberty to say this is a disqualification, when there are clauses which expressly state what shall be disqualifications, and this is omitted.

Rule discharged.

Friday,  
Nov. 11th.

The KING v. WHITE.

The Court will grant leave to a private relator to exhibit an information in nature of a quo warranto, against individual members of a corporation, although the affidavits on which the rule is moved, disclose matter tending to dissolve the corporation.

SIR W. W. Follett had obtained a rule in Hilary term last, calling upon the defendant to shew cause why an information in the nature of a quo warranto should not be exhibited against him, to shew by what authority he claimed to be mayor of the borough of Sunderland; on the grounds, first, that *George Stephenson*, who made out the burgess lists, was not town-clerk, nor a person performing duties similar to town-clerk; second, that the election of councillors was held before *Richard Spoor*, who was not mayor nor chief officer of the borough.

It appeared by the affidavits in support of the rule, that Sunderland had been duly divided into wards, burgess lists been made out by the overseers, revision of lists by barristers, and elections of councillors, aldermen, and mayor, made, according to the provisions of the Municipal Corporation Act (a); but the following facts were sworn to by several old residents in and near Sunderland, magistrates of the county of Durham, &c.—

That at the time of the passing the 5 & 6 Will. 4, c. 76, there was not any body corporate within the town of Sunderland, nor any reputation of the existence of any such

(a) 5 & 6 Will. 4, c. 76.

corporation; that there was no mayor nor any person having or claiming, or reputed to have, any authority or power in the municipal regulation or government of the town; nor any aldermen or commonalty; nor any officers having any municipal authority for the government or regulation of the town. That in the thirteenth century Bishop *Pudsey* had granted a charter of incorporation to the town, and that Bishop *Morton* had also granted one in 1634; but that, according to deponents' belief, no election of municipal officers was ever made under these charters; and that, at all events, for the last 100 years there had been no election, nor any corporation in fact.

That *George Stephenson* had at no time filled the office of town-clerk of Sunderland, or any office whose duties are in any way similar to the office of town-clerk; and that at the time of the election the only office filled by *George Stephenson* was the office of clerk to the magistrates; and that *Richard Spoor*, before the said election, never filled or pretended to fill any office for the municipal, or public, or other regulation, or government of Sunderland. That within the town there was a private body of persons, consisting of twelve freemen and eighteen stallingers, pretending to be a body in the nature of a private corporation, under the style and name of "The Freemen and Stallingers of Sunderland," who claim to be possessed of a common, called the Town Moor, as a part of their corporate property; which freemen and stallingers have always been elected by the said freemen, whenever vacancies have occurred by death or otherwise; and that the said freemen or stallingers have never interfered, nor is it their corporate duty to interfere, with the rule or government of Sunderland, nor have they ever exercised, or claimed to exercise, any corporate powers over the rest of the inhabitants of the town; and that *Richard Spoor* was one of the body of freemen and stallingers. That in the year 1829 a rule to shew cause why a certain information in the nature of a quo warranto had been obtained in this Court against the company for acting as a

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corporation (a); and on that information *Spoor* made an affidavit, in which he stated that the said freemen and stallingers had never interfered, or claimed to interfere, in the rule or government of Sunderland, and that the said rule for an information was discharged, according to the belief of deponents, on the ground that the said freemen and stallingers were a private corporation.

The affidavits against the rule stated, that the corporation of freemen and stallingers of the borough of Sunderland is an ancient corporation, existing from time immemorial, with the use of a common seal, and that there had not been an officer in Sunderland called town-clerk, but that *George Stephenson*, for thirteen years past, had acted as the attorney and solicitor of and for the said corporation of the said town of Sunderland, and attended and been present at the meetings of the corporation, pursuant to their orders, and executed duties in this borough similar to those usually executed by town-clerks: that there was not any officer called mayor of the said borough of Sunderland, but that the senior freeman for the time being of the town had at all times (save as hereinafter mentioned) acted as the chairman or chief officer of the said corporation, and that, in the absence of such senior freeman, the freeman for the time being of the said town next in seniority and rotation presided, and has been considered as the chairman or chief officer of such corporation.

That after the passing of the Municipal Corporation Act one *Bernard Ogden*, who was the senior freeman of the said town, was applied to, to take upon himself the duties of chief officer of the said borough at the election of the mayor, aldermen and councillors of the said borough, and upon his refusal, the four next senior freemen were successively applied to, and that upon their refusal, *Richard Spoor*, being the next senior freeman, took upon himself the duties of chief officer, as prescribed in the act of parliament; that the elections were conducted with perfect fair-

(a) *Rex v. Ogden*, 10 B. & C. 230.

ness in the mode pointed out by the act, and that the defendant was unanimously elected by the council to be the mayor of the borough.

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Sir *J. Campbell* A. G., and *Wightman*, now shewed cause. There are two grounds for discharging this rule: first, because the affidavits on which the rule was obtained shew, that the objection made to the mayor might be made to every member of the corporation; second (*a*), because the affidavits in answer establish that *Stephenson* and *Spoor* were acting as town-clerk and mayor respectively, within the meaning of the Municipal Corporation Act. The objection made to the defendant as mayor, is founded on the ground of there being no corporation in Sunderland. All the affidavits, if carefully examined, make that point; but a private relator is not entitled to an information under the 9 of *Anne*, c. 20, unless he admits that a corporation exists. (*b*) Sect. 4 of that statute says, "in case any person shall usurp, intrude into, or unlawfully hold and execute any of the said offices or franchises, it shall and may be lawful to and for the proper officer in each of the said respective courts, with the leave of the said courts respectively, to exhibit one or more informations in the nature of a quo warranto, at the relation of any person desiring to sue or prosecute the same;" but here the franchise is denied altogether. It is therefore an information against the whole corporation; which can only be filed by the Attorney-General; *Rex v. Carmarthen* (*c*), *Rex v. Ogden* (*d*). The objection is, that there was no person who *could* act as town-clerk or mayor; the clear consequence of which is, that *all* elections in Sunderland must be illegal and void; and therefore it comes within the rule, that it is not a case for a private relator, as the Court will not grant an information, of which the effect will be to dissolve a whole corporation. Suppose the 5 &

(*a*) As the Court made the rule absolute on the first point, the argument on the second is omitted.

(*b*) *Tancred's Quo Warranto*, 15.

(*c*) 2 Burr. 869.

(*d*) 10 B. & C. 230.

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6 Will. 4 had never passed, and an election of aldermen had taken place at Sunderland under the old charter,—would the Court have entertained the question for a moment, whether a private relator could complain of the election on the ground of there being no corporation? That clearly would be a case within *Rex v. Carmarthen* (a). Then, what difference can the 5 & 6 Will. 4 make, for the other side contend it is impossible to act upon it?

Sir *W. W. Follett*, *contra*. The objection to Mr. *White's* election as mayor is, that the machinery requisite by the Municipal Corporation Act (b) was not in existence in Sunderland at the time the act passed. The objection is not, as has been suggested, that there is no corporation at all in Sunderland, which would be a very difficult proposition to maintain; for sect. 6 of the act (b) provides, that after the first election of councillors in any borough, under the act, the body or reputed body corporate named in the schedule shall take and bear the name of the mayor, aldermen and burgesses of such borough. In schedule A, s. 1 of the act, the corporate body of Sunderland is found invested with the style of "the mayor, aldermen, and commonalty of the borough of Sunderland." If after this provision any one is found claiming any municipal office in Sunderland, it is open to any private relator to file an information to shew by what authority he claims to act. The case of *The King v. The Borough of Carmarthen*, of which there is another report (c), is really an authority for the present application; for there, although the Court would not allow the information against the whole corporation, the rules were granted against the several individuals of it, to shew by what authority they claimed to exercise their particular franchises. The effect of such rules, in numerous cases, would be to dissolve the corporation. The position therefore that the Court will not grant an information in

(a) 2 Burr. 869.

(c) 1 W. Bl. 187.

(b) 5 & 6 Will. 4, c. 76.

such a case, is bad law. *The King v. Ogden (a)*, is not an authority against granting the rule. That was an application against five individuals for acting as a body in a corporate capacity, having nothing to do with the municipal government of Sunderland,—a mere association for private purposes, as appears by the affidavit of *Spoor* on the occasion (a); and therefore was totally unlike the present application against an *individual*, for acting in a corporate office in a corporate town.

It may be admitted that there has been an oversight by the legislature; that they have enacted that matters shall be performed by the mayor and town-clerk of Sunderland, without being aware whether such persons were in existence or not; but still, care must be taken that the provisions of the act are complied with. By the act, Sunderland is to have forty-two councillors, who are to choose the mayor. By the 15th and 16th sections, the lists of burgesses by whom the councillors are to be elected, are to be delivered to the town-clerk, or to the person executing duties in the borough similar to those of town-clerk. The relator is entitled to the rule, to discover whether these and other provisions of the act have been complied with.

Lord DENMAN C. J.—It appears to me that the case of *The King v. Ogden (a)* is satisfactorily distinguished from this. There the direct question was, whether the Court would permit a private relator to file his information against individuals for acting as a corporation; and the Court held, that it was for the attorney-general alone to file such an information; but in *The King v. The Borough of Carmarthen (b)*, on which that was founded, it appeared the titles of individuals to corporate offices were questioned, although the Court would not allow the quo warranto to issue against the *whole* body claiming to be a corporation. In the present case it is as against an individual, holding a municipal office, that the motion is made; and therefore it does not appear to me that that rule, acted on in *Rex v. Ogden (a)*, applies.

(a) 10 B. &amp; C. 230.

(b) 2 Burr. 869; S. C. 1 W. Bl. 187.

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Then, with regard to all the facts of the case, there is certainly doubt enough to make it fit they should undergo the consideration of a jury; and therefore the rule must be made absolute.

PATTESON J.—Certainly *The King v. Ogden(a)* is distinguished in the way Sir William Follett has pointed out. It was clearly a motion on the ground that there was no corporation, although the rule was moved against five only; but the ground of the motion was, entirely, why they acted as a corporation at all; beside which, there was the circumstance that they did not claim to exercise municipal authority of any kind.

Then it really comes to this question, whether the circumstance of every member of this corporation (supposing we knew that to be so, distinctly on the affidavits) being in a similar predicament to the person against whom the motion is now made, would be a sufficient ground to refuse a quo warranto. I do not think we can go that length, when the objection is in itself an individual objection. What may turn out hereafter on the facts I do not know.

WILLIAMS J.—In all cases where there must be, not an election by the majority, but an election by certain distinct portions of the corporation, and the objection has been taken that the proper parties have not joined in the election, the effect would be to dissolve the corporation, yet in such cases the quo warranto has gone from this Court over and over again.

COLERIDGE J. concurred.

Rule absolute. (b)

(a) 10 B. & C. 230.

(b) A similar rule was made ab-

solute in *The King v. Spoor*, without argument.



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Friday,  
Nov. 11th.The KING *v.* TEMPLAR and others.

*C. JONES* moved, on behalf of the defendants, for leave to sue out a writ of certiorari to be addressed to the Commissioners of the Central Criminal Court, to remove an indictment that had been found there in the September Sessions of the present year, against *Templar* and others, for a conspiracy. The indictment contained five counts, and charged the defendants with having conspired together to obtain 45*l.*, the money of the prosecutor, by passing off an unsound horse to him for a sound one. *Templar* only had surrendered, and it was contended that as it was very doubtful, on the authority of *Rex v. Pywell* (a), whether the offence amounted to a misdemeanor, it was desirable that the trial should be had before one of the judges of the land and a special jury. The defendants also wished to have the assistance of king's counsel.

The Court of K. B. will not remove an indictment from the Central Criminal Court by certiorari, on the ground that a difficult question of law will arise.

LORD DENMAN C. J.—I do not think your client is in a condition to apply to the Court, as the other defendants have not surrendered. But at all events the Central Criminal Court is quite competent to decide all points of law that may arise in such a case, and we do not wish to encourage applications of this sort. (b)

PATTESON J. WILLIAMS J. and COLERIDGE J. concurred.

Rule refused.

(a) 1 Stark. 402.

(b) See *Rex v. Jowl*, ante, p. 28; and *The King v. Hunt*, 2 Chit. 130, where the Court would

not grant a certiorari to remove an indictment against several individuals, unless they all concurred in the application.

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*Saturday,*  
*Nov. 12th.*

**The KING v. The Justices of MIDDLESEX.**

1. The 13 *Geo. 2, c. 18, s. 5*, directs that no order of justices shall be removed, unless the certiorari be applied for within six months after the order is made: Where an act directs justices to make an order, and that it should be subsequently confirmed by an order of sessions, the period of six months is to be calculated from the date of the latter order.

2. An order of justices under the 55 *Geo. 3, c. 68*, for diverting a public footway and substituting a new one, which contains also an order for the stopping up the old footway, is void. There should be two separate orders; the one for diverting, the other for stopping up.

**BY** an order of four justices of the peace for Middlesex, at a special sessions, on the 3d of August, 1835, a public footway in the parish of St. Pancras was diverted and turned with the owner's consent, through land belonging to the Brewers' Company, and by the same order part of the same public footway was ordered to be stopped up and given to the Brewers' Company, in exchange for the new footway. On the 9th of October, 1835, at the quarter sessions of the peace for the county of Middlesex, this order was confirmed. On the 29th of December, 1835, a certificate was made by two justices, that the new footway was completed and put in good repair. On the 4th of January, 1836, an order was made for the enrolment of the certificate by the Court of Quarter Sessions. In Easter term last, on the 15th of April, *Wightman* obtained a rule nisi for a certiorari to remove the order of the 3d of August, 1835, for diverting and turning and stopping up the footway, and the order of the Court of Quarter Sessions confirming that order.

Sir *J. Campbell A. G.*, and *J. Greenwood*, now shewed cause. I. The application for the certiorari is too late. By the 13 *Geo. 2, c. 18, s. 5*, it is enacted, that no writ of certiorari shall be granted to remove any order made by any justice of the peace, unless such certiorari be applied for within six calendar months next after such order shall be made. The motion for this rule was made on the 15th of April, 1836, and the order for stopping up the road was made on the 3d of August, 1835. The application is therefore too late, since it should have been made within six calendar months after the date of the order. It is not sufficient that the application is within six calendar months

after the order was confirmed by the Court of Quarter Sessions; *The King v. Boughey* (a).

II. Unless a fatal objection to the order be pointed out, the Court will not grant a certiorari to remove it. The supposed objection to the order is, that not only does it direct the diversion of the footway, but that it also orders the old footway to be stopped up. It is said there should have been two orders, the one for diverting the footway, the other for stopping up the old footpath. Reliance is placed on the judgment of Lord *Tenterden*, in *The King v. The Justices of Kent* (b). Language is either there inaccurately attributed to Lord *Tenterden*, or his lordship was in error, as to the words and provisions of the existing statute. The 55 Geo. 3, c. 68, both in the enactments and the schedule (c), shews that there may be one order for diverting and stopping up a public footway. The old footway cannot be inclosed until the new one is made, and is certified to be in repair. But when that certificate is inrolled, no further order is necessary. By the second section of the 55 Geo. 3, c. 68, it is provided, that when it shall appear, upon the view of any two justices of the peace, that any public footway may be diverted, so as to make the same nearer or more commodious for the public, and the owner of the lands through which such new footway so proposed to be made, shall consent thereto, it shall be lawful, by order of

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Second point:  
The original  
order bad, be-  
cause it diverts  
and also stops  
up the old way.

(a) 4 T. R. 281.

(b) 10 B. & C. 477.

(c) "SCHEDULE (A).

*Form of Notice.*

Notice is hereby given, that on the       day of       last, an order was signed by J. W. and J. H., two of His Majesty's justices of the peace in and for the county of       for [if the order be for turning, diverting, and stopping up, &c., here so state it, and describe the road ordered to be turned, diverted, and stopped up;—

if the order be for stopping up a useless road, here so state it, and describe the road ordered to be stopped up,] and that the said order will be lodged with the clerk of the peace for the said county, at the general quarter sessions of the peace, to be holden at       in       and for the said county, on the       day of       next; and also that the said order will, at the said quarter sessions, be confirmed and inrolled, unless, upon an appeal against the same to be then made, it be otherwise determined."



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such justices at some special sessions, "*to divert and turn and stop up*" such footway, and to purchase the ground and soil for such new footway, by such ways and means, and subject to such exceptions and conditions, in all respects, as are contained in the 13 Geo. 3, c. 78, with regard to highways to be diverted; and also when it shall appear, upon the view of any two justices, that any public footway is unnecessary, it shall be lawful, by order of such justices, to stop up and to sell and dispose of such unnecessary footway, by such ways and means, and subject to such exceptions and conditions, in all respects, as in the said recited act (*viz.* the 13 Geo. 3) is mentioned, in regard to highways to be widened and diverted. The order for diverting and stopping up, authorized by this section to be made, is by the fourth section made conditional. That section enacts, that if no appeal be made, the inclosure of the old way may be made, and it may be stopped, and the proceedings shall be binding and conclusive to all persons whomsoever, but no inclosure of the old footway shall be made until the new footway shall be completed and put in good condition and repair, and so certified by two justices of the peace, upon view thereof; which certificate shall be returned to the clerk of the peace, and by him be inrolled amongst the records of the Court of Quarter Sessions, but that, from and after the inrolment of such order and certificate, such old footway shall be stopped up. If two orders were to be made, it might happen that the order for the diversion might be quashed, and the order for stopping up confirmed. The act regards the *order for stopping up*, and the *actual stopping up*, as two distinct matters. This may be proved in two ways—first, by observing the order of proceedings, in point of time, as they are directed by the act; and secondly, by reference to the particular phrases made use of. First, as to the order of the proceedings in point of time, by sect. 2, two justices at a special sessions are authorized to "*divert, turn, and stop up*;" by sect. 3, an appeal is given against the order for *stopping up*. The reason of the

latter provision is evident; for, so much of the order as regards the diverting and turning could be no grievance to any body, since the public could not be aggrieved by having two paths instead of one; and the owner of the land over which the footpath is diverted could not be aggrieved, for he must previously have given his written consent. Then, by the fourth section, if no appeal is made, or the proceedings shall be confirmed on appeal, the inclosures may be made and the ways stopped; but by 13 Geo. 3, c. 78, s. 19, "*no inclosure of such highways, or stoppage of such footways,*" shall be made until after a certificate of the completion of the new ways shall be made, returned, and inrolled; but from and after such inrolment, such highway or footway shall be stopped up, &c. Thus the appeal is against the *order for stopping*, but the *inclosures and stoppage* are not to be made until after confirmation of the order upon appeal, or expiration of the time for appealing. It follows, therefore, that the order for stopping, and the *stoppage* itself, are intended as different things in the act. But if that is clear, then, the order in which the proceedings have taken place in the present case, is not only in literal compliance with the words of the act, but will carry the principle of the act into effect with full security for the rights and convenience of the public. Then as to the particular phrases made use of, both the second section and the schedule speak of the order to divert, turn, *and* stop up, conjunctively. If the way cannot be actually stopped, although the order for stopping has been made, until after opportunity of appeal, and certificate of completion of road, a substantive order for stopping up, to be made *after* the certificate of completion, would be a mere form, neither in consonance with the words nor the meaning of the act, and affording no fuller opportunity of appeal than if it were incorporated with the order for diverting and turning, as the letter of the act requires.

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*Wightman*, in support of the rule. The certiorari was First point.

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moved for in sufficient time, as it was applied for within six calendar months after the order of confirmation by the Court of Quarter Sessions. *Rex v. Sheppard (a)*, which was recognized in *Rex v. The Justices of Kent (b)*, shews that the certiorari is not under these circumstances taken away.

II. It is admitted that if the judgment of Lord *Tenterden*, in *Rex v. The Justices of Kent (a)*, is right, this order is bad. The 55 Geo. 3, c. 68, recites the 13 Geo. 3, c. 78, in the preamble, and that it would be expedient that more public notice should be given of any order for diverting, turning, stopping up, and inclosing any highway, bridleway, or footway. It then repeals part of the 19th section of the 13 Geo. 3, but in the second clause re-enacts similar provisions with regard to the stopping and diverting a public footway, under circumstances like the present, using the same words as in the 13 Geo. 3. The same regulations are enjoined by both statutes. The second section of 55 Geo. 3, c. 68, enacts, that it shall be lawful, by order of such justices, at some special sessions, to divert, turn, stop and inclose, sell and dispose of such old highway or bridleway, and to purchase the ground and soil for such new highway, bridleway or footway, by such ways and means, and subject to such exceptions and conditions, in all respects, as in the said recited act (the 13 Geo. 3, c. 78,) mentioned, with regard to highways to be widened or diverted. What then is to be done with respect to highways to be widened or diverted under the 13 Geo. 3? In the schedule to that act there is a form (No. 16)(c) of an

(a) 3 B. & A. 414.

(b) 10 B. & C. 477.

(c) No. XVI.

*Order of Two Justices for Widening (or Diverting and Turning) a Highway.*

Middlesex.—We, two of His Majesty's justices of the peace for the said county, acting within the (hundred, &c.) of

within the said county, having upon view found that a certain part of the highway between and in the (parish &c.) of

in the said (hundred,) for the length of yards, or thereabouts, and particularly described in the plan hereunto annexed, is for the greatest part thereof narrow, and cannot be conveniently enlarged and made commodious

order by two justices, for widening or diverting and turning a highway. The third is a separate form, No. 18, for stopping up the old highway, and selling the land and soil thereof. But there is no form of an order which both diverts and also stops up the old highway. In *The King v.*

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for travellers, without diverting and turning the same, and having viewed a course proposed for the said new highway, through the lands and grounds of                      and of the length of                      yards, or thereabouts, and of the breadth of                      feet, or thereabouts, particularly described in the plan hereunto annexed, which we think will be much more commodious to the public, we do hereby order that the said highway be diverted and turned through the lands aforesaid, and that the surveyor of the highways for the (parish &c.) of                      where the said old highway lies, do forthwith proceed to treat and make agreement with the said                      and                      for the recompence to be made for the said ground, and for the making such ditches and fences as shall be necessary, in such manner, with such approbation, and by pursuing such measures and directions, in all respects, as are warranted and prescribed by the statute made in the thirteenth year of the reign of His Majesty King *George the Third*, for the amendment and preservation of the highways; and in case such agreement shall be made as aforesaid, we do order an equal assessment, not exceeding the rate of 6d. in the pound, to be made, levied and collected upon all and every the occupiers of lands, tenements, woods, tithes, and hereditaments, in the said (parish &c.)

of                      and that the money arising thereupon be paid and applied in making such recompence and satisfaction as aforesaid, pursuant to the directions of the said act.

## No. XVIII.

*Order for stopping up the old Highway, and selling the Land and Soil thereof.*

We whose names are subscribed, being the justices of the peace who have viewed the several highways described in the plans hereunto annexed, and made an order for diverting the old highway, and being satisfied that the new highway therein described is properly made and fit for the reception of travellers, do hereby order the said old highway, being of the length of                      yards, and of the breadth of                      feet, upon a medium, as appears by the said plan, to be stopped up, and the said soil thereof to be sold by the said surveyor to                      whose land adjoins thereto, if he shall be willing to purchase the same, for the full value thereof, if not, to some other person or persons, for the full value thereof, (reserving, nevertheless, to                      a free passage for persons, horses, cattle and carriages, through the land and soil of the said old highway, to and from the (land &c.) belonging to him, called                      according to his ancient usage thereof.

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*The Justices of Kent* (a), Lord Tenterden clearly expresses his opinion, that the statute gives no power to make one order for making a new road and stopping up the old, and that there is no form in the schedule to the 13 Geo. 3, applicable to such a mode of proceeding. In the schedule of that act, besides the forms which have been already referred to, there is also another form (No. 21)(b) for diverting and turning a public highway, bridleway or footway, as the case shall be, through the lands of any person who consents thereto, but that form is only applicable to diversion and turning, and does not direct the old road to be stopped up. If the 55 Geo. 3 had never passed, no doubt would exist. The object of that statute was not to place the public in a worse situation, and the Court will not therefore put such a construction on that statute as will have that effect. Reliance is placed on the form of the notice contained in the schedule to the 55 Geo. 3, which speaks of an order to divert, turn and stop up, but this is the same language which is used in the second section of the statute,

(a) 10 B. & C. 477.

(b) No. XXI.

*Order of Two Justices for diverting and turning a Public Highway and Bridleway, (or Footway, as the case shall be,) through the Lands of any Person who consents thereto.*

Middlesex.—We,                      and

Esquires, two of His Majesty's justices of the peace for the said county, at a special sessions, held at                      in the (hundred) of                      in the said county, on the                      day of                      one thousand seven hundred and                      having upon view found that a certain part of a (highway &c.) within the (parish &c.) of                      in the said hundred, lying between                      and                      for the length of                      yards, or thereabouts, and particularly described in the plan here-

unto annexed, may be diverted and turned, so as to make the same nearer (or more commodious) to the public, and having viewed a course proposed for the new highway, in lieu thereof, through the lands and grounds of                      of the length of                      yards or thereabouts, and of the breadth of                      feet, or thereabouts, particularly described in the plan hereunto annexed, and having received evidence of the consent of the said                      to the said new highway being made through his lands, hereinbefore described by writing under his hand and seal, we do hereby order that the said highway be diverted and turned through the lands aforesaid, and we do order an equal assessment &c. (in the same form as before mentioned.)

and it refers to the mode of proceeding in the 13 *Geo. 3*, with regard to highways. No stronger inference of intention can be drawn from finding these words in the schedule, than from their being in the body of the act, and it has been shewn that those words in the body of the act do not authorize the order.

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Lord DENMAN C. J.—The first objection appears to First point.  
 be disposed of by a great variety of cases, which assume that the period from which the six months are to be calculated, is not the time when the first order is made, but when the order of confirmation is made by the sessions. This application, therefore, comes within sufficient time. With regard to the second point, a great deal of doubt Second point.  
 may be raised as to what was the intention of the legislature, but when the words of the act are examined, they do not admit of any question. The second section of the 55 *Geo. 3*, c. 68; authorizes two justices of the peace to divert and stop up a footway, so as to make the same nearer or more commodious to the public, by the consent of the owners of the soil, “by such ways and means, and subject to such exceptions and conditions, in all respects, as in the 13 *Geo. 3* mentioned, with regard to highways to be widened or diverted.” It is then to be seen by what ways and means highways are to be widened and diverted by the 13 *Geo. 3*. The 19th section of that act enacts, that the provisions contained in the act are to be carried into effect by the forms given in the schedule, No. 16 and No. 18. The first is an order of two justices for widening or diverting and turning a highway; the second, for stopping up the old highway, and there is no provision or form by which the two acts may be done by one instrument. There is indeed a provision in the 55 *Geo. 3*, for preventing the inclosure of the old highway or footway, until a certificate has been obtained of the new way being completed, but that clearly does not do away with the necessity for two separate orders, because the same language appears in the 19th sect. of the

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13 *Geo. 3.* If there was any doubt on this subject, (and I do not pretend to say that there may not be,) the authority of Lord *Tenterden's* decision in *Rex v. The Justices of Kent (a)*, ought to prevail. Lord *Tenterden*, who is very high authority, clearly gives his opinion that the order in that case was bad, inasmuch as it attempted to do by *one* document that which the act of parliament requires to be done by *two*. Acting on that authority, and for these reasons, I am of opinion the rule ought to be made absolute.

First point.

PATTESON J.—I am entirely of the same opinion with regard to the first question. This certiorari being moved for within six months of the confirmation of the original order by the Court of Quarter Sessions, is applied for in sufficient time; if it were not so, the consequence would be, the party would not have the two remedies, to which by law he has a right. He has a right to have the merits determined by the sessions, and the legality of the order, in point of law, determined by this Court. There appears to be no direct authority that the period of time is to commence from the confirmation of the original order by the sessions, yet there is what amounts to the same thing. In *The King v. Sheppard (b)*, the date of the original order is stated, which was more than six months before the certiorari was moved for, and although it does not appear from the report to have been adverted to in the argument, yet it is to be presumed the point did not escape the attention of the Court.


Second point.

With respect to the second question, as to the necessity of two orders, on looking at the 55 *Geo. 3.* by itself, I should have thought one order was sufficient, because it gives the magistrates authority to divert, turn, and stop up the footways. But then it goes on to say, that that is to be done “by such ways and means, and subject to such exceptions and conditions, in all respects, as in the said recited act mentioned with regard to highways to be widened or diverted.” The recited act is the 13 *Geo. 3.* The first section

(a) 10 B. & C. 477.

(b) 3 B. & Ald. 414.

of the 55 *Geo. 3* repeals the 19th section of the 13 *Geo. 3*. The second section of the former act, however, gives to the justices the same power of stopping and diverting a footway, with the consent of the owner of the land through which the new way is to pass, as was given by the 19th sect. of the latter act, and the same words are used. The 19th sect. of the 13 *Geo. 3*, has also the same words as the fourth section of 55 *Geo. 3*, viz. that the old way shall not be stopped up until the new way is put in repair, and a certificate of two justices has been inrolled at the sessions, that that has been done. I am not aware that there is any express direction that there should be two orders, but when the schedule of the 13 *Geo. 3* is turned to, it is found that two forms for an order are given, one under the 16th section, which is to be made when the owner does not consent; another, by the 19th section, where the owner does consent; but the form of the latter order is only for diverting and turning, not for diverting and turning and stopping up; and as the words of the 19th section of 13 *Geo. 3*, are precisely the same as the words in the second section of 55 *Geo. 3*, I think the same forms must be adopted, and that there must be two orders. If there was any doubt about the question, the decision of *The King v. The Justices of Kent*(a) is in point. We ought, I think, rather to adhere to the former decision than decide against it, unless we were quite satisfied it was wrong, which we are not.

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WILLIAMS J.—I am also of opinion that the certiorari is not taken away in the present case. First point.

With regard to the point whether or not one order is sufficient, the question is, whether the 13 *Geo. 3*, has been in effect repealed by the 55 *Geo. 3*, in so far as regards the necessity for two orders, for it is not disputed that two orders were necessary under the former act. I own, if this had been the first discussion of the question, I should have had very considerable doubt upon it. But finding, as I do, that the very case has been decided before, and not Second point.

(a) 10 B. & C. 477.



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merely upon the authority of Lord *Tenterden*, (which nobody pays higher respect to than I do,) but also of my brother *Littledale*, I think the more recent act has not dispensed with the necessity for two orders. I observe that the words on which reliance has been placed, for the purpose of shewing that the act of the 55 *Geo. 3*, does not require two distinct orders, refer to the former act of parliament, as regulating the manner in which the diversion and stopping up is to take place. But in that act two forms are given in the schedule of the 13 *Geo. 3*, of different orders, one for diverting, and the other for stopping up. Another circumstance has in a certain degree weighed on my mind, namely, that the 55 *Geo. 3*, gives no new form of an order resembling this, which directs both the diversion and the stopping up. As the 13 *Geo. 3*, laboriously gives the forms of different orders, and as that act was immediately before the eye of the legislature, when the 55 *Geo. 3*, was passed, I should certainly have expected that there would have been given in the schedule of the latter act, the form of an order of a new kind, if so great an alteration had been intended.

First point.

COLERIDGE J.—On the first of these points I do not think any doubt whatever can be entertained, although it is certainly rather singular that none of the cases that are referred to in the digests, seem expressly to decide the point. One or two, particularly *The King v. The Justices of Sussex (a)*, certainly assumes it according to the way the Court now decide. When it is considered that this last order—the order of sessions is clearly within the six months—that in itself would seem to shew the certiorari cannot be taken away with respect to that order. But it is said, if the former proceeding is beyond the six months, the latter also, which has reference to it, cannot be removed. Whatever might be the case, supposing the first order conclusive, unless appealed against, cannot apply here, since the first order, whether there be an appeal or not, is merely preliminary, and is of no force until inrolled and made

(a) 1 M. & S. 734.

an order of the Court of Quarter Sessions; and it is from that act, therefore, of the Court of Quarter Sessions, the first order made by the two justices receives its effect.

With regard to the second point, I certainly have had a great deal of doubt, and if one read only the provisions of this latter statute,—the 55 Geo. 3,—I should have thought that the machinery would work better, and the common sense reading of the act would be in the mode adopted by this order; that is to say, that the justices, at the same time that they take a view of the intended diversion, should consider whether the old road might be properly stopped up, and should make one order for both at the same time. With regard to the first part—the diversion—it is hardly to be contemplated that any one would think it necessary to appeal against that, for that diversion can only be made by the consent of the owners of the land, and the public is at all events the gainer of a new road. The stopping up the old road therefore is the grievance by which, generally speaking, any one is likely to be affected, and it is not easy to perceive why the order for the diversion and stopping up should not be made *uno flatu*. It would rather appear, from the second and fourth sections of the 55 Geo. 3, that there should be an order directing the stopping up and diversion to take place, but that the execution of that order should be suspended until a certificate of two magistrates was obtained, that the new road is in a fit state for the public to enjoy the use of it. I can understand the meaning of that certificate, if there be no second order; but not if it be necessary to come again to the two magistrates, and from the two magistrates to the sessions, for a subsequent order to stop up. I was at first disposed to view this act of parliament in that way, but I think we are not at liberty so to construe it, because it is expressly provided, that the same ways and means are to be pursued for carrying this act into effect, that were pursued under the 13 Geo. 3, with reference to highways: those ways and means have been already pointed out to the Court by my brother *Patteson*, and I quite accord with the view he takes of the

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question. That seems to me to fetter us in the construction we should otherwise be disposed to give to the provision of the more recent act; and then when I recollect this very matter has been under the consideration of the Court on a former occasion, when Lord *Tenterden* pronounced his opinion on it,—a judge, the peculiar characteristic of whose mind was its extreme accuracy,—I think, even if there were less doubt on the subject, we ought to bow to the decision of that case.

Rule absolute.

*Tuesday,*  
*Nov. 15th.*

CANE v. CHAPMAN.

1. Case against the clerk to the commissioners for paving and lighting the town of H. The declaration alleged, that after the

CASE against the defendant, as clerk to the commissioners under a local act, for paving and lighting the town of Harwich. The declaration stated, that after the passing of the act, the plaintiff advanced to the commissioners a sum of money, not exceeding in the whole, together with all money then and theretofore advanced upon mortgage, 7000*l.*, viz.

passing of a local act, the plaintiff paid to the commissioners a sum of money, and thereupon by a grant made, according to the form of the statute, five commissioners, by virtue of the act, in consideration of 1350*l.*, paid to them by the plaintiff, did grant to the plaintiff an annuity of 140*l.*, out of the rates to arise by virtue of the act, to be paid quarterly; that a quarterly payment was due; that the commissioners had money in their hands, arising from the rates, and were requested to pay, and it thereupon became their duty to pay; concluding with a breach, complaining of non-payment. The plea, which traversed that it was not the duty of the commissioners to pay, was held bad on special demurrer, as it tendered a mere issue of law.

2. Case is the proper form of action against the commissioners of such an act, who have granted an annuity on the credit of the rates, in pursuance of the powers given them by the act, if they neglect to pay the annuity when they have sufficient rates in their hands.

3. The grant of an annuity by five of the commissioners, named in a local act, in these words—"We five, &c. do grant unto *A. B.* an annuity of out of the rates granted, and to arise by virtue of this act," according to the form prescribed in the act, does not raise any personal liability in the grantors, as on a contract, the act empowering any five to be a quorum.

4. Where a clause in the above local act enabled the commissioners to sue or be sued for or concerning any thing done by virtue or in pursuance of the act, in the name of their clerk, and a subsequent clause provided that no action should be commenced against any person, *for any thing done in pursuance of this act*, until fourteen days' notice had been given to the clerk of the commissioners:—Held, that an action against the clerk, for the non-payment of an annuity, granted in pursuance of the act, was maintainable, notwithstanding the latter clause applied to misfeazances or malfeazances only.

5. Where a clause in a local act authorized the commissioners to grant an annuity to any person advancing money *for the purposes of the act*, *semble*, that a declaration in an action on the case against the commissioners for not paying the annuity, is bad on special demurrer, if the plaintiff do not allege that the money was advanced for the purposes of the act.

1350*l.* for the purchase of an annuity, to be paid and payable during the natural life of the plaintiff; and thereupon, by a certain grant then made, according to the form of the said statute, five of the commissioners, appointed by and in pursuance of the said act, did, by virtue of the said act, at a certain meeting held pursuant thereto, in consideration of the sum of 1350*l.*, advanced and paid to them by the plaintiff, grant unto the plaintiff, his executors, administrators, and assigns, one annuity or yearly sum of 140*l.* 8*s.* out of the rates granted and to arise by virtue of the said act, to be paid to the plaintiff, his executors, administrators, and assigns, by four equal quarterly payments in every year, during the natural life of the plaintiff, at or in the Guildhall of Harwich aforesaid; and that the first payment thereof should be made upon the 1st day of March then next ensuing. And that after making the said grant, to wit, on the 1st day of December, in the year of our Lord 1834, a large sum of money, to wit, the sum of 35*l.* 2*s.*, for one quarterly payment of the said annuity, became and was due and payable to the plaintiff, whereof the commissioners so appointed as aforesaid then had notice. And that before and at the time at which the said last-mentioned quarterly payment became and was due and payable, the commissioners so appointed as aforesaid had received and then held and retained in their hands, out of the rates granted and arising by virtue of the said act, divers large sums of money more than sufficient to pay and satisfy the said quarterly payment. And the commissioners so appointed as aforesaid were then requested, at and in the Guildhall of Harwich aforesaid, to pay the said quarterly payment, or cause the same to be paid, to the plaintiff, and it thereupon became the duty of the said commissioners to pay the said quarterly payment, or cause the same to be paid to the plaintiff, at or in the Guildhall of Harwich aforesaid; yet the said commissioners, &c. (Breach, setting out that they had not paid the quarterly payment.) There were two other counts for non-payment of the annuity in March and June, 1835.

Pleas; first, not guilty.

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Second, that it was not the duty of the said commissioners to pay or cause to be paid to the said plaintiff the said several quarterly payments in the said declaration mentioned, modo et formâ, &c. Concluding to the country.

Replication to the first plea, similiter.

Special demurrer to the second plea, setting out for cause that the said second plea is double and multifarious, seeking to put in issue all the matters of fact stated in the declaration, which respectively precede the assertion of the liability of the commissioners to pay the respective instalments of the annuity. And further, that the defendant has by his second plea traversed and attempted to put in issue that which is a mere inference of law, resulting from the matters of fact by which the liability of the commissioners is created. Joinder in demurrer.

The marginal note to the demurrer stated, that the objections to the plea were the causes assigned in the demurrer, and that the points intended to be urged by the defendant were,

First, that case cannot be supported.

Second, that the defendant is not liable, as clerk to the commissioners, under the circumstances stated, and ought not to have been made a defendant in this action.

The local act provided (a) that all acts and proceedings relating to the execution of the act might be done by any five of the commissioners therein named, except when a greater or lesser number were particularly required. Five of the commissioners were (b) authorized to borrow money *for the purposes of this act, upon the credit of the rates, by mortgage*. And another clause (c), after reciting that many persons might choose to advance money for the purchase of annuities, *to be secured upon and payable out of the rates*, enacted, that it should be lawful for any person to contribute and pay to the commissioners, *for the purposes of this act*, any sum of money, not exceeding in the whole, together with the money to be advanced upon mortgage as aforesaid, the sum of 7000*l.*, for the absolute purchase of

(a) P. 4.

(b) P. 33.

(c) P. 38.

one or more annuities, which annuities should be payable and paid by the commissioners out of the money to arise by or from the said rates; and a form of a grant was given similar to the grant declared upon in the declaration.

It was also provided (a) that the said commissioners might sue or be sued, *for or concerning any thing which should be done by virtue or in pursuance of this act, in the name of their clerk for the time being.*

And by a clause at the end of the act (b) it was enacted, that no action should be commenced against any person *for any thing done* in pursuance of this act, until fourteen days' notice thereof be given to the clerk of the commissioners; with the other usual provisions for the limitation of actions, venue, and general issue, in clauses of this nature.

*Cresswell*, (and *J. Manning* was with him,) in support of the demurrer. As the plea evidently cannot be supported, from its tendering in issue a question of mere law, the defendant of course relies on his objections to the declaration.

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First point.  
The plea traverses matter of law.

The first objection is, that an action on the case cannot be maintained against the commissioners. But this depends on the question, whether it is the *duty* of the commissioners to pay over the money raised by a rate, or not. The sections (c) which empower them to raise money by annuity, enact, that they *shall* pay the annuity out of the money to arise by or from the said rates. It is admitted on the record, that there is money in their hands arisen from the rates. If, therefore, they neglect to pay, it is a breach of the duty thrown upon them by statute, for which an action lies. According to the doctrine laid down in *Sutton v. Johnstone* (d) "every breach of a public duty, working wrong and loss to another, is an injury, and actionable." *Comyn C. B.* (e) lays down the same position, citing *Rolle's Abr.* [*Coleridge J.* Would not a mandamus lie to compel them to pay the annuity?] A mandamus would be necessary to

Second point.  
Case maintainable.

(a) P. 9.

(d) 1 T. R. 493—509.

(b) P. 45.

(e) Com. Dig. Action on the

(c) P. 37, 38, of act.

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compel the commissioners to raise the rate; but if the party, to whom the payment should be made, has sustained any loss by non-payment, he may bring his action on the case, according to one of the resolutions in *Keighley's case* (a), which is as follows:—"When one is bound by prescription or otherwise to repair a wall, and if through his fault the danger becomes inevitable, or that he himself is not able to repair it, by which, as hath been said, all are charged, &c.; every one of them may have an action on the case against him who is so bound to repair the wall, &c., and shall recover their damages according to their loss." On this principle it was held in *Schinotti v. Bunsted* (b), that an action on the case lay against the commissioners of a lottery for not paying over the amount of a prize. So, in *Lacom v. Hooper* (c), against commissioners of excise, for not paying over a sum of money, to which the plaintiff was entitled, under an act of parliament; and also, in a case in *Rolle* (d), by a member of parliament, against the sheriff, for not raising 10*l.* 4*s.*, "pro expensis suis in attendenciâ in parlamento;" though it is apprehended in all those cases the same objection might have been taken, that a mandamus would have gone. Case also may be sometimes maintained, although debt would lie; of this *Sprosbey v. Evans* (e) is an example; and the same point is discussed in *Steinson v. Heath* (f).

Third point.  
 Action maintainable  
 against clerk.

But then it is said, at all events the clerk ought not to have been sued. The words of the act are—"The said commissioners may sue or be sued for or concerning any thing which shall be done by virtue or in pursuance of this act, in the name of their clerk." Can it be contended, when the commissioners have borrowed a sum of money under the provisions of this statute, that it is not an act done under this act? The meaning of the section is, that where an action is brought on any matter concerning the provisions of the act, the clerk shall represent the commissioners.

(a) 10 Rep. 139.

cited also 1 Vin. Abr. 569.

(b) 6 T. R. 646.

(e) 1 Roll. Abr. 103, pl. 2.

(c) 6 T. R. 224.

(f) 3 Lev. 400.

(d) 1 Roll. Abr. 93, pl. 19,

*Ogle*, contrâ. It is no objection to a plea that it traverses matter of law, if it is mixed up with matter of fact(a). [Coleridge J. What allegation of fact is denied in the plea?] The demurrer objects that it puts in issue all the facts in the declaration precedent to the allegation of the commissioners' liability to pay the annuity. As to its being multifarious, that is no objection if the facts put in issue amount to one connected proposition. It was not the duty of the commissioners to pay, because they were not personally liable, and because they were not bound to give the plaintiff a priority; and those facts could not have been given in evidence under the plea of not guilty.

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First point.

The substantial objections, however, are to the declaration. The wording of the act(b) shews, that when the commissioners were authorized to raise money, credit was intended to be given to the rates only, and not to the commissioners personally. In *Horsley v. Bell*(c), it was held, that the commissioners were personally liable; but that was because they had entered into contracts on their own responsibility. And Lord Bathurst C. said expressly "they had made themselves liable by their own acts." *Eaton v. Bell*(d) is to the same effect. [Lord Denman C.J. It may be collected from *Eaton v. Bell* that the money was raised on the credit of the rates there.] Here, the terms of the act and of the grant shew that the personal responsibility of the commissioners is by no means involved. The plaintiff, therefore, might have had his remedy by mandamus, or he might have brought his action on the covenant against the five commissioners who granted him the annuity. [Lord Denman C.J. It does not appear that the grant was under hand and seal. The form given in the act does not say the grant must be under seal.] Being a grant of an annuity, it is submitted it must have been intended that it should be by deed; but presuming that a deed was unnecessary, and that it was only a *parol* grant, which was intended, they would have been liable in assumpsit. If that be so, there are

(a) Com. Dig. Pleader, (G. 5.)

(c) Ambler, 770.

(b) P. 37, 38.

(d) 5 B. & Ald. 34.



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two objections to this action against the clerk. First, the five commissioners are liable either in covenant or in assumpsit; and, secondly, according to the well known rule in pleading, case can only be brought against the actual tortfeasors. And assuming that the clerk may be sued for the tortious act of the whole body of commissioners, the act here is by five only of the body. *Everett v. Cooch* (a) establish this position, that where, by a local act, the treasurer or clerk is to be sued for any cause of action against the justices, the action will not lie against him for an act of five justices, though by the statute five formed a quorum.

Third point.  
The non-pay-  
ment of an-  
nuity not "an  
act done"  
within the act.

But supposing there to be a cause of action against the commissioners, the clause which enables parties to sue the clerk in their name, must be taken in conjunction with the clause of the act, which provides that no action shall be commenced for any thing done in pursuance of the act, until fourteen days' notice be given to the clerk, and therefore, before the action shall be commenced, it is requisite that the fourteen days' notice mentioned in that clause be given to the commissioners, which has not been done in this case. Again, another clause allows the clerk to be sued only "for or concerning any thing which shall be done by virtue or in pursuance of this act." The complaint against the commissioners here is for a nonfeasance; and it has been held that such a clause applies only to a misfeasance or malfeasance; *Umphelby v. M'Lean* (b), and that a nonfeasance can never be understood to mean "an act done;" *Doe d. Abdy v. Stevens* (c); nor does it signify in such a case whether the action be framed in case or assumpsit; *Waterhouse v. Keen* (d).

Fourth point.  
The money not  
alleged to be  
raised for the  
purposes of  
the act.

But there is another objection to the declaration; the act only authorizes the commissioners to raise money upon the credit of the rates, "for the purposes of this act;" but there is no averment, either express or implied, that the money has been raised for those purposes, and for aught

(a) 7 Taunt. 1.

(b) 1 B. &amp; Ald. 42.

(c) 3 B. &amp; Ad. 299.

(d) 6 D. &amp; R. 257; S. C. 4 B. &amp; C. 200.

that appears five of the commissioners appointed by the act might have granted the annuity for their own purposes. This objection is good on general demurrer.

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*Cresswell*, in reply. [The Court requested him to confine his argument to the objections to the declaration.] It is first said the commissioners are not liable, because no credit was given to them personally. It is then said that they are not liable, because credit was given to them, and they might have been sued in covenant or assumpsit. The first proposition is the true one; the commissioners are not liable personally, but it is their duty to pay when money raised by the rates is in their hands, for a breach of which, case lies; and as to their not being obliged to give the plaintiff priority, the question does not arise on the record. It is difficult to understand *Cooch v. Everett (a)*, from the mode in which it is reported; but it may be gathered from the judgment that if the five justices were empowered to act for the whole body, the treasurer might have been sued, but not if they only were responsible. Here, it is evident, the whole body of commissioners are liable. Second point.

It is then said, as this action is not brought within the limitation clause, it is consequently not within the clause allowing the clerk to be sued in the name of the commissioners. But the two clauses are made diverso intuitu. The words in the former section cannot receive the narrow construction contended for, as it would be absurd to say this action is "not concerning any thing done in pursuance of this act." Third point.

The declaration sufficiently shews that the money was raised for the purposes of this act, as it states that the commissioners *did, by virtue of the act*, grant the annuity in question: at all events the objection could only be taken on special demurrer. Fourth point.

LORD DENMAN C. J.—The Court have already intimated a clear opinion that the plea in this case cannot be maintained, for the obvious reason, it puts in issue an inference of law, and no particular fact. First point.

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Then there are two substantial objections made to the declaration. The clause which requires the commissioners, on raising the money, to grant an annuity in the form which is set out in this declaration is this:—(Here his lordship read the grant of the annuity, as stated in the declaration.) And the first question is, whether that is an act done within the act of parliament, so as to give the party a right to complain of it, and a right to make the clerk the defendant in the action.

Third point.

The words of the act are, “that the commissioners may sue or be sued for or concerning any thing which shall be done by virtue of or in pursuance of this act, in the name of their clerk.” If this grant can be brought within those terms, the clerk is properly sued. The strongest argument to shew that *this* is not such a matter as is contemplated by the clause in question, is, that, founded on the clause for the limitation of actions, by which it is required that no action shall be commenced against any person, for any thing done in pursuance of the act, until fourteen days’ notice thereof shall be given to the clerk; and the argument is, one clause must be taken to be correlative to the other, and that, as the clerk could not be sued for the alleged cause of action on the latter clause, therefore, this is not a case in which the clerk can be sued by reason of the former; but it seems to me there is in the enabling clause language which effectually distinguishes it from the clause for limitation of actions. The commissioners by the one clause are to be sued in the name of their clerk, when the action is brought *for any thing done* in pursuance of the act; but the power to sue them in the other clause is given when the action is brought *for or concerning any thing done by virtue* or in pursuance of the act of parliament. The language of the latter clause is considerably more extensive than that of the former. It seems to me that as the charge on the rate is made by virtue of the act of parliament, that the non-payment of the annuity concerns an act done for which the clerk may be sued. Besides, as the grant of the annuity is a charge on the rates, I do not see how the commissioners could ever be personally respon-

sible. These five are deputed to act in this respect for the whole body; and any action concerning an act done by the whole body by virtue of or in pursuance of the act of parliament, is to be brought against the clerk, and not against the commissioners. It seems to me, therefore, that the clerk is the proper person to be made the defendant. He is, by the act, made the representative of the commissioners to the plaintiff in the present action, with regard to the grant of the annuity.

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The next question is, whether the action is properly brought in *case*. As the word "grant" is to be found in the instrument set out in the declaration, I should have thought that whether it was a contract under seal, or a parol contract, an action on the contract might have been supported. However, the consideration formerly stated by me, namely, that the commissioners are not personally liable, and are throughout acting in execution of a public trust, seems to me to make it proper that the action should be brought against the whole body, for a neglect of that public duty imposed upon them by the legislature. I am of opinion, therefore, that these two objections are both effectually met; that the action is properly brought against the clerk, because it is concerning a thing done by the commissioners by virtue of the act of parliament; and also it is properly brought in *case*, because those commissioners are in no way personally liable, but have neglected a public duty, by not disposing of that money in the mode in which the act of parliament has directed them.

PATTESON J.—I am entirely of the same opinion. The plea is clearly a traverse of a mere inference of law. It is not a denial of fact, but a denial of the duty of the commissioners. That does not put in issue the facts stated, out of which that duty arises.

With respect to the clerk being the proper defendant; in this case, it seems to me, that he is, for the reasons my lord has already given. The act does not direct that the clerk

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shall be sued as a real defendant, so as to make him personally responsible for any judgment to be obtained in this case. The commissioners are liable as the real defendants, as appears from the case of *Wormwell v. Hailstone* (a), which shews that the case in *Taunton* (b) may be good law, and the test whether an action can be brought against them in the name of their clerk is, are the commissioners, as a body, liable to this or any other action? If here there had been a contract made by five of the commissioners, so as to bind those five commissioners personally, I should agree that no action on the case, or any other action, would lie against the whole body, and it would follow, no action would lie against them in the name of their clerk. But as this is not a contract in any way binding personally, but a mere grant under the act of parliament, by which there is no agreement to pay at all events on the part of the five, or of the whole body of the commissioners, but only to pay out of the rates; and as the five commissioners were mere instruments of the whole body (if I may so say) to make the grant; and as it therefore became the duty of the commissioners, as the body at large, whenever they had the means, to pay the grantee out of the rates,—the action is properly brought against the clerk, provided this case falls within the words of the section which authorize an action to be brought against him. It seems to me it does. The intention of the legislature is clear, that the commissioners should be sued in the name of the clerk, when any question arises concerning an act done under the act of parliament. The words “concerning any thing done under this act,” certainly are different from those used in the limitation clause. In that section there is no such word as “concerning.” Is this action concerning any thing done in pursuance of the act? The grant is a thing done, beyond all doubt, in pursuance of the act. But the action is brought for money which is due to the parties to whom that grant is made. It is therefore an action concerning this grant; the grant being

(a) 4 M. & P. 512; S. C. 6 Bing. 668. (b) *Everett v. Cooch*, 7 Taunt. 1.

the thing done by virtue or in pursuance of the act. The words of the limitation clauses in acts of this nature, "for any thing done in pursuance of the act," (leaving out "concerning,") have always had the construction put on them, undoubtedly, that they are limited to some act of a party, which he means to do under the act, but which, it may turn out, he was not altogether warranted in doing, in which case he is protected; they have been always considered to be confined strictly to acts done, and do not apply to cases of contract. I think, however, the other clause, containing additional words, shews that a case of this kind was intended to be included.

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It follows quite of course, that if the commissioners, as Second point.
 a body, are the persons answerable for the payment of this money, supposing they had it in their hands, that an action on the *case* must lie against them, because they have made no contract. The contract is clearly not binding on the whole body; if it is on any one, it must be on the five who made the grant; and for the reasons I have given, I do not think it is binding on the five. The only mode therefore in which any action whatever could be brought, is in the mode now taken. Then it is said, the commissioners are not bound to give priority of payment to the plaintiff. But it does not appear on the face of the record that there are other creditors. As far as the record goes, the plaintiff is the only creditor the commissioners have; and the sum of money that they have in their hands is applicable to the payment of his debt, and that only.

On the whole, therefore, it seems to me the action is rightly brought; and our judgment must be for the plaintiff.

WILLIAMS J.—I am clearly of the same opinion. The First point.
 plea is bad; for it obviously is an attempt to put in issue the duty resulting from a series of facts that are pleaded in the declaration, upon any of which issue might have been taken.

I cannot accede to the difficulty that is surmised, as to

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question. That seems to me to fetter us in the construction we should otherwise be disposed to give to the provision of the more recent act; and then when I recollect this very matter has been under the consideration of the Court on a former occasion, when Lord *Tenterden* pronounced his opinion on it,—a judge, the peculiar characteristic of whose mind was its extreme accuracy,—I think, even if there were less doubt on the subject, we ought to bow to the decision of that case.

Rule absolute.

Tuesday,
Nov. 15th.

CANE v. CHAPMAN.

1. Case against the clerk to the commissioners for paving and lighting the town of H. The declaration alleged, that after the

CASE against the defendant, as clerk to the commissioners under a local act, for paving and lighting the town of Harwich. The declaration stated, that after the passing of the act, the plaintiff advanced to the commissioners a sum of money, not exceeding in the whole, together with all money then and theretofore advanced upon mortgage, 7000*l.*, viz.

passing of a local act, the plaintiff paid to the commissioners a sum of money, and thereupon by a grant made, according to the form of the statute, five commissioners, by virtue of the act, in consideration of 1350*l.*, paid to them by the plaintiff, did grant to the plaintiff an annuity of 140*l.*, out of the rates to arise by virtue of the act, to be paid quarterly; that a quarterly payment was due; that the commissioners had money in their hands, arising from the rates, and were requested to pay, and it thereupon became their duty to pay; concluding with a breach, complaining of non-payment. The plea, which traversed that it was not the duty of the commissioners to pay, was held bad on special demurrer, as it tendered a mere issue of law.

2. Case is the proper form of action against the commissioners of such an act, who have granted an annuity on the credit of the rates, in pursuance of the powers given them by the act, if they neglect to pay the annuity when they have sufficient rates in their hands.

3. The grant of an annuity by five of the commissioners, named in a local act, in these words—"We five, &c. do grant unto A. B. an annuity of out of the rates granted, and to arise by virtue of this act," according to the form prescribed in the act, does not raise any personal liability in the grantors, as on a contract, the act empowering any five to be a quorum.

4. Where a clause in the above local act enabled the commissioners to sue or be sued for or concerning any thing done by virtue or in pursuance of the act, in the name of their clerk, and a subsequent clause provided that no action should be commenced against any person, *for any thing done in pursuance of this act*, until fourteen days' notice had been given to the clerk of the commissioners:—Held, that an action against the clerk, for the non-payment of an annuity, granted in pursuance of the act, was maintainable, notwithstanding the latter clause applied to misfeazances or malfeazances only.

5. Where a clause in a local act authorized the commissioners to grant an annuity to any person advancing money *for the purposes of the act*, *semble*, that a declaration in an action on the case against the commissioners for not paying the annuity, is bad on special demurrer, if the plaintiff do not allege that the money was advanced for the purposes of the act.

1350*l.* for the purchase of an annuity, to be paid and payable during the natural life of the plaintiff; and thereupon, by a certain grant then made, according to the form of the said statute, five of the commissioners, appointed by and in pursuance of the said act, did, by virtue of the said act, at a certain meeting held pursuant thereto, in consideration of the sum of 1350*l.*, advanced and paid to them by the plaintiff, grant unto the plaintiff, his executors, administrators, and assigns, one annuity or yearly sum of 140*l.* 8*s.* out of the rates granted and to arise by virtue of the said act, to be paid to the plaintiff, his executors, administrators, and assigns, by four equal quarterly payments in every year, during the natural life of the plaintiff, at or in the Guildhall of Harwich aforesaid; and that the first payment thereof should be made upon the 1st day of March then next ensuing. And that after making the said grant, to wit, on the 1st day of December, in the year of our Lord 1834, a large sum of money, to wit, the sum of 35*l.* 2*s.*, for one quarterly payment of the said annuity, became and was due and payable to the plaintiff, whereof the commissioners so appointed as aforesaid then had notice. And that before and at the time at which the said last-mentioned quarterly payment became and was due and payable, the commissioners so appointed as aforesaid had received and then held and retained in their hands, out of the rates granted and arising by virtue of the said act, divers large sums of money more than sufficient to pay and satisfy the said quarterly payment. And the commissioners so appointed as aforesaid were then requested, at and in the Guildhall of Harwich aforesaid, to pay the said quarterly payment, or cause the same to be paid, to the plaintiff, and it thereupon became the duty of the said commissioners to pay the said quarterly payment, or cause the same to be paid to the plaintiff, at or in the Guildhall of Harwich aforesaid; yet the said commissioners, &c. (Breach, setting out that they had not paid the quarterly payment.) There were two other counts for non-payment of the annuity in March and June, 1835.

Pleas; first, not guilty.

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presents on the face of it any objection that can be taken advantage of on general demurrer. The only points that have been suggested are, first, the omission of an averment of the action having been brought within due time, or that due notice had been given. That was just mentioned, and seemed to be abandoned; but in the course of the argument it was answered, that the clause which requires that, does not extend to a case of this sort; to which I quite agree.

Fourth point.

Then it is said, there is no averment in the declaration that the money had been advanced for the purposes of the act; and if that had been assigned as a ground of special demurrer, I should have thought it almost insurmountable, and, as at present advised, I do not see how it could have been got over; but it appears to me, that on general demurrer there is enough in the declaration to obviate the difficulty, because it is stated, that by a certain agreement then made according to the form of the statute, five of the commissioners did, by *virtue* of the act, grant unto the plaintiff, &c. *By virtue of the act* they could only borrow the money for the purposes of the act, and could only grant the annuity in the discharge of the money so borrowed. Therefore I think, on general demurrer, that objection is done away with by that allegation in the declaration.

Second point.

There is one point more which has been relied on, as to the priority of payments, but it is one which does not appear on the face of the declaration, and which I think the language of the declaration rather excludes.

Judgment for the plaintiff.

Ogle then applied for leave to amend, on the ground that it would occasion no unnecessary expense, as the cause was to go down for trial on the general issue; and he stated that the commissioners really had not money to pay the annuitants in full.

The COURT, however, refused leave.

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Tuesday,
Nov. 15th.

DOE on the demise of HARRIS v. SAUNDERS.

EJECTMENT for land in the parish of Charlbury, in Oxfordshire. The declaration contained two demises, the one on the 1st January, 1829, and the other on the 1st January, 1835.

At the trial before *Williams J.*, at the Oxford Summer Assizes for 1835, a verdict was found for the lessor of the plaintiff, subject to the opinion of the Court upon a case, which was in substance as follows:—

The lessor of the plaintiff claimed the premises in question, which consisted of ten acres and two roods of land, situate in the hamlet of Chadlington West, in the parish of Charlbury, as mortgagee in fee of one *Jonah Smith*, under whom both parties claimed, and who was admitted to be seised in fee previously to the execution of any of the deeds given in evidence. The lessor of the plaintiff's case was as follows:—

By deeds of lease and release of the 17th and 18th Dec. 1834, (respectively made between *Jonah Smith* and *Mary* his wife, of the one part, and the lessor of the plaintiff of the other part,) certain premises were released by *J. Smith* unto the lessor of the plaintiff and his heirs, subject to a proviso of redemption. The following is a description of the parcels in those deeds:—

A messuage and building, lands and premises, by the open field description being half-a-yard land, late *Daniel Smith's*, and all such allotment or allotments, pieces or parcels of land or ground, and premises, which the commissioners acting by or under virtue of an act of parliament made and passed in the 51st of Geo. 3, intituled an act, &c., had set out, or should set out, allot, and award, in lieu of and satisfaction for the open field, land, grounds and right of common, of the estate of the said *Jonah Smith*, called late

Where a local inclosure act, (51 Geo. 3, c. 25,) for inclosing certain open fields provided that the several lands and grounds to be awarded and allotted to the several persons concerned, and the several messuages, lands, &c. which should be exchanged in pursuance of that act, or of the General Inclosure Act, (41 Geo. 3, c. 109,) immediately after such allotments and exchanges were made, should be, remain, and enure to the several allottees who shall from thenceforth stand and be seised and possessed thereof, to such and the same uses, estates, trusts, and purposes as the several messuages, tenements, &c., in lieu of which the allotments were made, were held by:—

Held, that an allottee, on being put in possession of an allotment by the Commissioners under the act, acquired immediately, and before any award was executed, the same legal estate in it as he had in his ancient messuage.

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Daniel Smith's, consisting of half-a-yard land in Chadlington aforesaid, and each of them and every part thereof.

The act referred to in the above description was passed for inclosing the open fields in the hamlet of Chadlington West and East, in the parish of Charlbury, in Oxfordshire. The 34th section of that statute enacted that certain commissioners thereby appointed should set out, divide, and allot all the lands thereby directed to be inclosed (which included the premises in question), amongst the several proprietors thereof, and persons interested therein, in proportion and according to their several and respective lands, rights of common, and other rights and interests in, to, and over the same. The 43rd section provided, that if any person had sold, or should at any time before the execution of the award of the said commissioners, sell his interest in, over, and upon the said open fields to any person, then it should be lawful for the said commissioners, and they were thereby required, with the consent in writing of such vendor or vendors respectively, to make an allotment or allotments of the land unto the purchaser in such sale, or to his heirs or assigns; and that the purchaser thereof should, from and after the execution of the award, hold and enjoy the lands so to be allotted to him as aforesaid, in the same manner, to all intents and purposes, as the vendor in every such sale might, could, or ought to have held and enjoyed the same in case such sale had not been made. The 46th section was as follows:—"That the several lands so to be allotted and awarded upon the said division and inclosure to the several persons concerned, and the several messuages, lands, tenements, old inclosures, new allotments, and other hereditaments, which shall be exchanged in pursuance of this act, or the said recited act (a), immediately after such allotments and exchanges are made as aforesaid, shall be, remain, and enure to the several persons to whom the same shall be respectively allotted or given in exchange as aforesaid, who shall from thenceforth stand and be seised and possessed thereof, to

(a) 41 Geo. 3, c. 109.

such and the same uses, estates, trusts, and purposes, and subject to such and the same wills, settlements, limitations, powers, and remainders, leases, (except leases at rack rent) charges, and incumbrances, as the several and respective messuages, lands, tenements, old inclosures, or other hereditaments in lieu of which such allotments or exchanged premises shall be respectively made or taken as aforesaid, are now held under, subject to, or liable to be charged with, or affected by, or might or would have been held under, or subject to, or liable to have been charged with, or affected by, in case this act had not been made."

The commissioners made their award on the 2nd July, 1825, and did thereby award unto and for the said *Jonah Smith*, in lieu of and satisfaction for, the open fields, lands, grounds, and right of common of his estate, called late *Daniel Smith's*, consisting of half-a-yard land, the allotments next herein described; that is to say,

One plot or parcel of land or ground, situate in the hamlet of Chadlington West, at Crooked Oaks furlong, containing ten acres and two roods, bounded by the Chipping Norton road, by the second allotment to said *Jonah Smith*, and by the twenty-one allotments to Sir *Edwin Bayntum Sandys*, the boundary fences of the last described allotment are against the Chipping Norton road, and against the second allotment to the said *Jonah Smith*.

The premises sought to be recovered in this action were the ten acres and two roods of land allotted by the commissioners as above. The whole of the title-deeds relating to the property were placed in the hands of the solicitor of the lessor of the plaintiff, at the time of the execution of the above mortgage deeds in 1824, and had continued uninterruptedly in the possession of the said solicitor, or of the lessor of the plaintiff, ever since.

The case proved by the defendant was as follows:—The commissioners set out the allotments in pursuance of this act, and delivered to *Jonah Smith* a description, and put him in possession, of this allotment of ten acres two roods in 1812, and he remained in possession until his death in

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1827, since which time to the present time, his wife *Mary* and the defendant have been successively in possession.

By an indenture of mortgage of the 21st November, 1818, the said *Jonah Smith* demised for 500 years unto the defendant, "one plot or parcel of land or ground, being one of the allotments in lieu of half-a-yard land late *Daniel's*, purchased by said *Jonah Smith* of one *John Smith*, situate in the said hamlet of Chadlington West, at Crooked Oak furlong, containing ten acres and two roods, &c." This description is similar to the description of the allotments which was delivered to *J. Smith* by the commissioners in 1817, afterwards inserted in the award as above stated.

The defendant also put in indentures of lease and release of 28th and 29th December, 1826, made respectively between said *J. Smith* of the first part, the defendant of the second part, and one *E. V. H.* of the third part. The indenture of release recited the said last-mentioned indenture of mortgage of November, 1818; and that doubts had been entertained with respect to its validity, and whether *J. Smith* was, at the time of the execution thereof, seised of the fee simple of the premises thereby demised, by reason that the commissioners under the local act for inclosing the open fields of Chadlington had not then signed their award, and contained a demise and confirmation by *J. Smith* to the defendant of the premises in question.

The question stated for the consideration of the Court was, whether, under all the above circumstances, the lessor of the plaintiff is entitled to recover the premises in question? If the Court should be of that opinion, then the verdict to stand; if they should be of a contrary opinion, then a verdict to be entered for the defendant.

The following were the points stated by the plaintiff. "1st. The defendant's interest prior to the award, and also subsequently to the award, was merely equitable. 2nd. The lessor of the plaintiff's title was, prior to the award, under a legal estate in the tenement as it existed prior to the inclosure act, and became a legal estate in the allotments in question by force of that act and the award."

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W. J. Alexander for the lessor of the plaintiff. The allotment became vested in the lessor of the plaintiff immediately on the award being made. The 34th section, coupled with the 46th section of the local inclosure act, show that the person to whom the conveyance of the old tenement was made, is entitled to the allotment as soon as the award was made. The case finds that the conveyance of the old tenement, or yard land, was made to the lessor of the plaintiff; whereas, the defendant's deeds conveyed nothing but the future allotments, in which the mortgagor himself could have no estate till the award was made. The second point decided in *Doe d. Sweeting v. Hellard (a)* shews that the allottee by name, is not the only person who can take a legal estate in premises allotted under a local act. In that case there was a clause in a local inclosure act similar to section 46, in this act; and an ancient tenement being granted to three persons successively for their lives, an award which was made, gave an allotment in respect of the ancient tenement to the first tenant for life only. And it was held, that although the other two were not named in the award, the legal estate vested in them successively on the death of the previous tenant; as the effect of the award was, to vest the legal estate in the allotment in the parties entitled to the old estate. There are several cases which decide that the legal title to an allotment is not acquired before the award is made. *Farrer v. Billing (b)* is decisive on this point, and that decision must govern the present case, for it turned upon the construction of a local act very similar in all its provisions to the act under consideration. Lord *Tenterden* C. J. there held, that although power was given to inclose and enjoy in severalty, and to sell and convey allotments under that act before the award was made, still the legal estate did not pass until the award was executed. Section 43, of the Chadlington Act, contains the same provisions for sale of allotments as the act in *Farrer v. Billing (b)*, but it has not been acted upon in the present

(a) 4 Mann. & Ryl. 736; 9 B. & C. 789.

(b) 2 B. & Ald. 171.

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case. This distinction has always been taken, that as there is no title to an allotment under an inclosure act before award made, unless the act contains a clause authorizing conveyances to be made before award executed, (as in *Kingsley v. Young* (a),) the owner of the allotment cannot give any title to a purchaser until the award is made (b).

There is a case, certainly, where the contrary was holden, *Doe d. Dixon v. Willis* (c), but the report of it is so meagre, and *Farrer v. Billing* (d) even was not brought before the notice of the Court, that it cannot be considered an authority. The local act in that case probably contained a clause authorizing conveyances to be made before award. If it did not, it is understood that the case was expressly overruled by the Master of the Rolls in 1833 (e). [*Coleridge J.* The case is also reported in 3 M. & P. 24.] The lessor of the plaintiff is also entitled to recover as a second mortgagee who has no notice of a prior incumbrance, and having all the title-deeds in his possession. *Buller J.*, in *Goodtitle v. Morgan* (f), said, "a second mortgagee, who has the title-deeds without notice of any prior incumbrance, shall be preferred; because, if a mortgagee lend money upon mortgage, without taking the title-deeds, he enables the mortgagor to commit a fraud;" the only title therefore that the defendant can make, is an equitable one; which of course cannot prevail against the legal title of the lessor of the plaintiff. *Right v. Bucknell and others* (g). It may be also contended, that the defendant, as standing in the place of the mortgagor, cannot dispute the title of his mortgagee.

Cripps, contra. If one fact, which has been left out of view, be imported into the argument on the other side, all the authorities cited make for the defendant. The mortgage to the lessor of the plaintiff is prior in date to the award, as

(a) 17 Ves. 468; S. C. 18 Ves. 207.

(b) *Lowndes v. Bray*, MS. 1 Sugd. V. & P. 342, 9th ed.; *Cane v. Baldwin*, 1 Stark. 65.

(c) 5 Bing. 441.

(d) 2 B. & Ald. 171.

(e) *Mortlock v. Kentish*, not reported.

(f) 1 T. R. 755.

(g) 2 B. & Ad. 278.

well as the mortgage to the defendant. Therefore whatever title the plaintiff claims through his mortgagor must necessarily come to the prior mortgagee first. It is important to look at the facts, as they happened, in their order. In 1811 the local inclosure act passed; in 1812 *Jonah Smith* was put into possession of an allotment in lieu of the open field land; in 1817 the commissioners under the local act delivered a description of the allotment to *Jonah Smith*, and that is the same description which they afterwards set out in their award; in 1818 *Smith* granted to the defendant a term of 500 years in the allotment so set out to him by the commissioners. Section 46, of the local act, says, that immediately after the allotments shall be made under the act, the allottee shall be seised and possessed thereof to the same uses, estates, trusts, and purposes, as the several old tenements in respect of which the allotments were made, were held by. *Jonah Smith* being seised in fee, took the same estate in the allotment, and therefore was capable of making a good title to the defendant directly the allotment was made to him. This distinguishes the case from *Farrer v. Billing* (a), for in the local act there, it was provided expressly that the purchasers of allotments should not have the title of their vendors until *after the execution of the award*. But the defendant is not driven to the interpretation of the Chadlington act, as *Farrer v. Billing* (a) was decided before the late general inclosure amendment act (b); and that decision is understood to have given rise to that act. Section 2, of that act (b) enables any person to whom an allotment has been made and possession given, to maintain ejectment to recover possession of such allotment from any person whatsoever, notwithstanding the award of the commissioners has not been made. The act, therefore, is conclusive on this case.

As to the right of the lessor of the plaintiff in virtue of his possession of the title-deeds, it is evident that possession of them may be easily explained. He may probably take them as mortgagee of a larger estate, and thereby be entitled

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 Doe
 v.
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(a) 2 B. & Ald. 171.

(b) 1 & 2 Geo. 4, c. 23

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to them. The doctrine laid down by *Buller J.* in *Goodtitle v. Morgan* (a) has been repeatedly exploded, particularly in *Bailey v. Fermor* (b).

W. J. Alexander in reply. Reliance has been placed upon the words in section 46, "*immediately after such allotments*" passing the legal estate, but the commencement of the section refers to the subject-matter, viz. "the lands so to be awarded and allotted;" such allotments therefore must mean such as had been awarded, and *Farrer v. Billing* (c) is an authority to show the legal estate in the allotment does not pass until the award is made. The 1 & 2 Geo. 4, c. 23, has also been relied upon for the defendant, but that statute, by giving the allottee, before the award is made, power to bring ejectment, shews he had not such power previously; and, consequently, no legal estate before; for if it had been intended to give a legal estate, it would have been given in express words.

LORD DENMAN C. J.—The lessor of the plaintiff in this case seeks to recover by proving a title under *Jonah Smith*, who, he alleges, conveyed the property in question to him in 1824. The defendant's answer is, "I was already entitled under *Jonah Smith*, by virtue of the 46th section of a statute, which directed the inclosure of certain lands in the 51st of Geo. 3. (Here his lordship read the 46th section.) According to the terms of that clause, which seem to me not to admit of any resort, either to the general inclosure act, or to the 1 & 2 Geo. 4, *Jonah Smith* had full power to mortgage the property to the defendant in 1818. The defendant, therefore, not only proves that the legal estate is not in the lessor of the plaintiff, but he shews a good title in himself.

PATTESON J.—In this case the question, as in *Farrer v.*

(a) 1 T.R. 755.

(b) 9 Price, 262. See also 1 Sugd. V. & P. 485, 9th ed.; and Lord Eldon's observations on the

doctrine of *Buller J.*, in *Evans v. Bicknell*, 6 Ves. jun., 184.

(c) 2 B. & Ald. 171.

Billing (a), turns solely on the local act. Lord *Tenterden* there said, "the language of the local act on which the case of *Kingsly v. Young* (b) arose, was different from that of the act under our present consideration. The legislature may certainly, by proper words, give the seisin and legal estate on the allotment only, and before execution of the award. It may, but we think the present act does not contain any words proper for that purpose, or indicative of any such intention." On looking at the 46th section of the local act in question, it appears to me the act does contain proper words for the purpose, and indicative of an intention to give the legal estate on the allotment only, and before the execution of the award. The words are, "that the several lands and grounds so to be allotted and awarded (that is to say, respecting which there is hereafter to be made an allotment and award) upon the said division and inclosure to the several persons concerned, and the several messuages, lands, tenements, old inclosures, new allotments, and other hereditaments, which should be exchanged in pursuance of this act or the said recited act, *immediately after such allotments and exchanges are made as aforesaid*, shall be, remain and enure to the several persons to whom the same shall be respectively allotted, &c." The obvious meaning of those words, "*immediately after such allotments*," is immediately after the allotments are actually in point of fact made. It is argued that they mean when the allotments are made and completed by the award. In my opinion they mean when the allotments are in point of fact made, not when the award is made. If the act had stopped there, it might perhaps have been contended, that it conveyed no legal estate, because it would be merely to remain and enure to them; that is to say, they should have some interest; but the clause goes on to say, "who shall from thenceforth stand and be seised and possessed thereof, to such and the same uses and purposes as the lands (in lieu of which these allotments are made) were then held under or liable to, or would have been held under and liable to, if the act had not passed."

(a) 2 B. & Ald. 171.

(b) 17 Ves. 468; S. C. 18 Ves. 207.

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Jonah Smith, the mortgagor who was seised in fee of the old property, immediately after the allotment, by the operation of the 46th section, became seised in fee of the allotment. That was in 1812, and he makes a mortgage for a term to the defendant in 1818. The 1 & 2 Geo. 4, did not pass until 1821, three years after the deed was executed, and therefore cannot apply to this case at all.

WILLIAMS J.—I am entirely of the same opinion. If, as was said by Lord *Tenterden*, it be practicable for the legislature to frame an act of parliament which shall have the effect of vesting at once an interest in the allotments in lieu of the old lands for which they are substituted, in my opinion that power has been exercised in the 46th section of the local act. For, so far from the vesting of the legal estate being made to turn on the completion of the award, that section in terms expresses, that the several persons to whom the lands and grounds shall be allotted, shall from thenceforth stand and be seised and possessed thereof to such estates as the several lands in lieu of which the allotments have been made were subject and liable to.

COLERIDGE J.—The defendant in this case has the prior title in point of time, and the only question is, whether, at the creation of this title, *Jonah Smith* had any power to give him a legal estate. That depends, as it seems to me, on the construction of the 46th section of the local inclosure act alone; and according as that shall be construed, all the cases cited for the plaintiff seem to me, as was observed in the argument, applicable in support of the defendant's proposition. (His lordship here read the 46th section.) The plaintiff says, that the words used in this section must mean the allotments perfected by the award being executed. Without referring to the cases that have been cited, the clause itself and the other clauses in the act must be looked to for the construction of this act. Hardly any section can be pointed out in which the word *allotment* does not occur in a totally distinct sense

from that of *allotments completed by the award*. "Allot and award," "allotments and awards," are to be found again and again used in almost every clause to express the popular sense of an allotment set out by the commissioners, as opposed to the legal sense, to distinguish between the exact legal meaning of the two terms. If that be so, directly the commissioners had made the allotments, *Jonah Smith*, by being put in possession, became seised in fee, and being so, he had a perfectly good right to make this mortgage for 500 years to the defendant. The case of *Doe d. Sweeting v. Hellard (a)*, which has been urged on the other side, and the observation applies to all the other cases, really bears as much in favour of the defendant when the construction is once settled, as it otherwise would do in favour of the plaintiff.

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Postea to the defendant.

(a) 4 M. & R. 736; S. C. 9 B. & C. 789.

SYMS v. CHAPLIN and others.

Tuesday,
 Nov. 15th.

ASSUMPSIT against carriers for the non-delivery of a parcel. The declaration stated, that before, &c., a fiat in bankruptcy had issued against the plaintiff; and that he was declared bankrupt, underwent his final examination, and got his certificate, signed by the due number of creditors, by the

1. Where the plaintiff gave a parcel, directed to F., in London, to the carrier at B., who drove a mail cart between B. and M., and the carrier booked it at M. at an inn where the defendants' coach stopped to take in parcels, and received the carriage for it from the innkeeper, who was in the habit of booking parcels for the defendants' coach, and did book this parcel to London, and delivered it to the coachman of the defendants:—Held, that the carrier was the agent of the plaintiff, and the innkeeper the servant of the defendants; and, therefore, that the plaintiff might recover damages from the postmaster for the loss of the parcel.
2. An inn where a book is kept for booking parcels by a particular coach, which stops regularly there to take in and deliver parcels, is a receiving house for parcels, within the meaning of the Carriers' Act, 11 Geo. 4 and 1 Will. 4, c. 68; although other coaches stop at the same inn for the same purpose, and the innkeeper sends the parcel by which coach he pleases.
3. In an action of assumpsit against carriers for the loss of a parcel above the value of 10*l.*, the defendants cannot give in evidence, under non assumpsit, the defence given them by the Carriers' Act, that the value of the article had not been declared at the time of delivery.

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statute in such case made and provided; and caused and procured the same to be signed and sealed by the major part of the commissioners under the said fiat, ready to be transmitted to London for the purpose of having the same duly allowed. And the plaintiff being possessed of the said certificate of conformity, so signed by the said creditors, and signed and sealed by the said commissioners as aforesaid, the same being of great value, caused the same certificate to be delivered unto the defendants (they, the defendants, being common carriers of goods and merchandise for hire, in and by a certain coach from Melksham to London,) to be taken care of, and safely and securely carried and conveyed by defendants, as such carriers as aforesaid, in and by the said coach from Melksham to London aforesaid; and there, to wit, at London aforesaid, to be safely and securely delivered by the defendants for the plaintiff. And in consideration thereof, and of certain reward &c., they undertook, to the plaintiff, to take care of the certificate, and to convey the same in and by the said coach from Melksham aforesaid to London aforesaid, and there, to wit, at London aforesaid, safely and securely to deliver the same for plaintiff. Concluding with a breach of the promise.

The defendants pleaded, first, non assumpsit; second, that the plaintiff did not deliver the certificate to the defendants modo et formâ; and third, the following special plea: that the certificate was delivered by plaintiff for the purpose of being carried and conveyed as in the said declaration mentioned, after the passing of 1 *Will.* 4, c. 68; and that the certificate was and is a certain writing within the meaning of the said act, and that the value thereof exceeded the sum of 10*l.*; and that the certificate was not delivered at any office, warehouse, or receiving house of the defendants, as such common carriers as aforesaid, but that the same was delivered to and received by a certain servant of the defendants in that behalf; and that plaintiff did not, nor did any other person on his behalf, at the time when the said certificate was so delivered to and received by the said servant of the defendants

as aforesaid, declare the value and nature thereof ; nor did the plaintiff then, or at any other time, pay to the defendants, nor to their said servant who so received the certificate as aforesaid, nor to any other person or persons on behalf of the defendants, any increased rate of charge over and above the ordinary rate of carriage, as a compensation for the greater risk and care to be taken for the safe conveyance of such certificate, or any other increased charge whatsoever ; nor did the defendants, or any or either of them, nor did the said servant who so received the said certificate as aforesaid, nor any other person on behalf of the defendants, then or at any other time accept any engagement to pay the same.

Replication to the first and second pleas, taking issue ; and to the third, *de injuriâ*.

At the trial at the last Wiltshire assizes, before *Williams J.*, it appeared that the defendants were the mail-coach proprietors between Bath and London, and that the plaintiff, who had been a bankrupt, and had procured the signature of his creditors and the commissioners to his certificate, sent it in a parcel to the postmaster at Bradford, who took in parcels for the mail-cart between Bradford and Melksham. It was directed to *S. Fisher, Esq.*, Cheapside, London, and the postmaster received two-pence for booking it. The mail-cart took the parcel to Melksham, and delivered it to *Bird* the landlord of the King's Arms Inn there, who kept books for the booking of the parcels for the mail ; he received two-pence for booking it to London, and delivered it to the driver of the defendants' coach, who paid him for the carriage between Bradford and Melksham. It appeared also, that the defendants' coach had stopped at *Bird's* house regularly, for upwards of two years, up and down, not to change horses, but for the purpose of taking in and delivering parcels ; and that other coaches did the same. *Bird* had no express authority from the defendants to book parcels for them, and there was no notice stuck up in his office, nor in the office of the postmaster at Bradford, as to the increased

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rate of charge to be made on parcels above 10*l.* value, pursuant to the 11 *Geo.* 4 and 1 *Will.* 4, c. 68, s. 2. The parcel in question was lost, and the value of the certificate contained in it was proved to be upwards of 10*l.*

Upon these facts the learned judge left it to the jury to say, whether *Bird's* inn was a receiving house of the defendants, for the purpose of receiving parcels to be conveyed by their coach; if it was, then the plea was not proved, because it was delivered at a receiving house of the defendants, and not to a servant of the defendants, as alleged in the plea. *Bompas* Serjt., for the defendants, objected that it was immaterial whether it was a receiving house, if *Bird* was the servant of the defendants, as no notice of the value had been declared. The learned judge reserved the points made, and the jury found a verdict for the plaintiff, damages 20*l.*; and the learned judge gave the defendants leave to move to set that verdict aside and enter a nonsuit.

First point.

The inn not a
receivinghouse
for parcels.

Bompas Serjt., on the second day of this term, moved for a rule nisi to set aside the verdict, and to enter a nonsuit. This is a question upon the Carriers' Act (*a*). The first point is, whether the house of the innkeeper was a receiving house, as described in the act, and it clearly was not. For, though parcels were taken in for the defendants' mail occasionally, the innkeeper might have sent them by any other coach. He was not the servant of the defendants, since he was not paid by them; besides, as at the time he took in the parcel it was not clear by what coach he would send it, it is evident he was not such an agent of the defendants as the act contemplates, because section the second provides, that at the time the parcel is delivered, the carrier may demand an increased rate of charge for it. To be an agent for the defendants, therefore, he must have been so at the moment he received the parcel, so as to have been able to demand the increased charge, but he clearly was not.

(*a*) 11 *Geo.* 4 and 1 *Will.* 4, c. 68.

Secondly, There was no contract between the plaintiff and the defendants, which is the issue raised by the second plea; the plaintiff makes a contract with the postmaster at Bradford to send his parcel to London; he sends it by the carrier who takes it to Melksham; and books it by a coach, not necessarily the defendants, to London. The postmaster at Melksham, who undertakes to forward the parcel, exercises his discretion, and forwards it by the defendants' coach; there is, therefore, no privity of contract between the plaintiff and defendants; if the postmaster had delivered it to some messenger of his own to take to London, it is manifest the postmaster would have been liable.—[*Coleridge J.* You assume that the contract with the postmaster was from Bradford to London.]—The evidence is so.

Thirdly, The first section of the act (*a*) provides, that carriers shall not be liable for the loss of goods above the value of 10/., unless the value be declared on delivery, and an increased charge be paid. There is, then, a provision as to a notice, (stating the increased rate of charge to be paid on such parcels,) which is to be stuck up in the receiving house. It is not to be assumed, that, on the declaration of the value, the coach proprietor will, nor is he bound to make an increased charge, as the carrier may choose to forego the additional charge, but in all cases the value must be declared, in order that he may know what risk he is incurring. If that, then, be a condition precedent, it is immaterial whether the parcel was delivered at a receiving house or not. No other section is applicable but the third, which enacts, that carriers are to give receipts acknowledging the increased rate, and in case of neglect to give a receipt, or to affix notice, they are not to have the benefit of this act; but the meaning is, that the coach proprietor shall not have the increased value unless there has been a notice stuck up; and although the words of the act are very strong, ("if such receipt shall not be given when required, or such notice as aforesaid shall not have been affixed, the carrier shall be responsible as at common law,") they apply to the case where the coach proprietor takes an

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Second point.

No contract
between plain-
tiff and de-
fendants.

Third point.

Carriers not
liable unless
value of article
declared.

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increased charge, and refuses to give a receipt.—[*Cole-ridge J.* The same point was made in the argument in *Owen v. Burnett (a)*.]—That case is relied upon as an authority to shew, that the plaintiff can in no case recover for the value of an article above 10*l.*, unless he has given express notice of the value to the carrier.

First point.

LORD DENMAN C. J.—On the first point made, whether this was a warehouse for receiving parcels or not, I can entertain no doubt, because, as it appears by the evidence, that the defendants used it for a long space of time for that purpose, it clearly was adopted by them as a receiving house, and such a house as the one in question is accurately described, both in the statute and the plea, as a receiving house, which the jury have very properly found it to be. As to the second point, I think there clearly was a contract

Second point.

with the defendants. The undertaking of carriers is, to deliver the parcel to whomsoever it be directed, and the fact of there being a series of agents, by whom a duty is to be performed in conveying such a parcel to the carrier, does not alter his responsibility in consequence of a breach of his contract, if the parcel be lost after delivery to him. The third point, whether the plaintiff was bound to declare the value of the parcel at the time of delivery, is one of great importance, and we will take time to consider it.

First point.

PATTESON J.—As to the first point, my brother *Bompas* rests his argument on this, that the innkeeper was not the servant of the defendants, or in any way connected with them; but the innkeeper says in his evidence, “he kept books for the mail parcels, and that the mail stopped regularly at his house, for two years and a half, up and down, to receive parcels;” if the mail had merely stopped to change horses, there might have been more in the argument, as then taking in a parcel or two occasionally might not have made it a receiving house, but the stoppage is for the express purpose of receiving parcels; and yet it is contended, that

the house was not a receiving house. It does not signify in the least, whether the innkeeper was to receive remuneration from the defendants or not. Then, as to the contract not being entered into with the defendants, the evidence shews clearly, that the person at Bradford did not undertake to convey the parcel to London, but, (as in all cases where persons leave parcels with him,) to do nothing more than forward it from Bradford to Melksham only; having conveyed it to the latter place, his responsibility ceased: it is clear that must have been the understanding of all parties. If that be so, the driver of the mail-cart to Melksham was the agent of the plaintiff for the purpose of delivering it to the coach by which it was to go to London, and the inn being the receiving house of that coach, the innkeeper is the servant of the defendants for the purpose of accepting the parcel; the parcel, therefore, being taken to the inn, the contract to convey safely to London is made between the plaintiff and the defendants by their respective agents.

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Second point.

COLERIDGE J.—I am of the same opinion. If we take the facts as they arose in their order, there is no difficulty as to the first two points. The plaintiff takes a parcel to Bradford, directed to London, and delivers it to a person at Bradford, who forwards it to Melksham and receives two-pence either for booking it, or for carriage to go to Melksham. Putting a reasonable construction on this contract, it is clear that it was not a contract by the postmaster to take the parcel to London, but to Melksham, and having done so, he had discharged his duty and was entitled to his reward. Then, what is the state of facts at Melksham; the jury have found that the coach has stopped for the last two years and a half at the inn, (regularly up and down,) to take in parcels; does not that make it a receiving house? Clearly it does, because it must be understood the coach stops there by the direction of the defendants; but it is said it is not a receiving house, because the innkeeper is in the habit of receiving parcels for other coaches as well as the defendants, and as he might exercise an option as to which coach he would send it by,

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Second point.

he did not take it in as an agent for the defendants' coach; but I apprehend, on any reasonable construction, as soon as he has received a parcel to be conveyed by coach, and delivers it to a particular coach, he has received it as agent for that coach. That being so, we may dismiss all the previous transactions up to the period of the delivery at the defendants' receiving house, and it can make no difference whether the parcel was delivered there by the plaintiff himself, or by an agent on his behalf.

First point.

WILLIAMS J.—The great contest at the trial undoubtedly was, whether this was a receiving house or not; and it struck me, and the jury also, that on that point it was a case of no difficulty. The language of the statute is very plain; it says, that every office, warehouse, or receiving house, which "shall be used" for the receiving of parcels, shall be deemed to be a receiving house; for two years and a half this house has been used for the receipt of parcels—what more can be required to make a house a receiving house, surely not an appointment under hand and seal.

Cur. adv. vult.

Third point.

LORD DENMAN C. J. on this day delivered the judgment of the Court.—The only question remaining to be disposed of in this case is, whether, since the passing of the Carriers' Act, the plaintiff is entitled to recover from the defendants the value of a parcel worth more than 10*l.*, lost by them as carriers, but of which the plaintiff had not declared the value. The declaration stated, that the plaintiff delivered to the defendants, as carriers, the parcel in question at Melksham, to be carried by them in their coach from Melksham to London, and to be there delivered, and then avers, that in consequence of their non-delivery the plaintiff had incurred damage of 60*l.* The second plea traverses modo et formâ the delivery at Melksham; we think, on the evidence under that plea, the plaintiff entitled to retain his verdict, as the jury have found that the defendants

did receive that parcel at Melksham for the purposes mentioned—which might have been consistent with the fact of notice being given. But it is objected, on the authority of *Owen v. Burnett (a)*, that the plaintiff cannot recover for any article above the value of 10*l.*, unless he has given express notice of the nature and value of the article, and that notice, therefore, is a condition precedent to bringing the action: that case, however, was decided before the new rules, and we think that, now, such a defence must be specially pleaded.

Rule refused.

The KING v. The Inhabitants of HOLBEACH.

Wednesday,
Nov. 16th.

THE pauper in this case was removed by an order of justices from Holbeach to Spalding. The Court of Quarter Sessions, upon appeal, quashed the order, subject to the opinion of this Court upon a case which stated in substance as follows:—The examination of the pauper stated a settlement by hiring and service with *J. B.*, in the parish of Spalding. In the notice of appeal given by that parish, the ground of appeal stated was, that at the time of the pauper's contracting to serve in Spalding for a year, "the pauper did stipulate and agree with *J. B.*, his intended master, that he should, out of his year's service, be allowed to have two days' holidays at *Spalding Club Feast*," and that on those days he was absent. At the hearing of the appeal, at the Lincolnshire quarter sessions, the pauper on cross-examination stated, "that at the time of hiring himself to *J. B.* he bargained for one day's holiday to go to *Holbeach fair*, and that he had such holiday in pursuance of the said bargain; but he denied that he made any bargain to have holidays at Spalding club feast, and in fact he had not such holidays." This evidence was objected to on the part of the respondents, as the holiday at Holbeach fair formed no part of the ground of appeal, but the sessions admitted it, and treating the

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SYMS
v.
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Where the examination of the pauper stated a settlement by hiring and service in Spalding, the ground of appeal, stated by the appellants in their notice, was, that the pauper had stipulated for two days holidays at *Spalding club feast*:—Held, that it was not open to them to prove a stipulation for one day's holiday at *Holbeach fair*.

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contract as an exceptive hiring quashed the order. The question for the opinion of the Court is, whether such evidence was admissible (a),

Amos, in support of the order of sessions. The question in this case is, whether the exceptive hiring stated in the notice has not been substantially proved. That is a matter of fact, and it must be assumed that it has been so proved, as the sessions have found the facts; and this Court will not review the decision of the Court below on questions relating to their own practice.

Lord DENMAN C. J.—It is quite clear that we ought to hold parties strictly to the notice they have given. It is very easy to imagine a case of this sort, where a notice might be given fraudulently, with a view to mislead, and yet a very slight difference in the proof be tendered from that specified in the ground of appeal. The objection having been taken at the hearing, we all think it must prevail.

PATTESON, WILLIAMS, and COLERIDGE Js. concurred.

Order of Sessions quashed.

Whately was to have argued against the order of sessions.

(a) See the proviso in the New Poor Law Act, 4 & 5 Will. 4, c. 76, s. 81, as to the evidence to be given at the hearing of an appeal, in the next case, *Rex v. The Inhabitants of Kelvedon*.

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 Nov. 16th.

The KING v. The Inhabitants of KELVEDON.

Where in the copy of the examination sent by the respondent parish, pursuant to 4 & 5 Will. 4, c. 76, s. 79, the pauper stated that his father belonged to the parish of A., and that he had done no act to gain a settlement, the respondent parish may prove any species of settlement in the pauper in A.

UPON appeal against an order of two justices, whereby *James Bird*, his wife and their three children, were removed from the parish of Kelvedon, in Essex, to the parish of Colsterworth, in Lincolnshire, the sessions quashed the order subject to the opinion of this Court on the following case:—

The pauper having, subsequently to the 1st November, 1834, become chargeable to the parish of Kelvedon, an

1834, become chargeable to the parish of Kelvedon, an

order of magistrates was obtained by the overseers of Kelvedon for the removal of himself, and his wife and children, to the parish of Colsterworth, in Lincolnshire; and in compliance with the 79th section of the 4 & 5 Will. 4, c. 76, notice in writing of the pauper, *Sarah* his wife, and their three children, being so chargeable, accompanied by a copy of the order of removal of the pauper, and his wife and children, and by a copy of the examination upon which such order was made, was sent by the post by the overseers of the parish of Kelvedon to the overseers of the parish of Colsterworth. The examination was as follows:—

“*Essex.* The examination of *James Bird*, of &c., who saith as follows:—I was born at Kelvedon, where my father then resided, but belonged to the parish of Colsterworth, in Lincolnshire, and continued to belong there till his death, as I have heard and believe; and I have also heard him say, that he was a certificated man from the parish of Colsterworth, in Lincolnshire. That I have never done any act, whereby to gain a settlement in my own right, to the best of my knowledge and belief. That I have a wife named *Sarah*, and three children, namely, *Sarah*, aged four years, *William*, aged two years, and *Harriet*, aged one year.”

The notice, accompanied by a copy of the order of removal, and by a copy of the examination, was duly received by the overseers of Colsterworth; who, within twenty-one days after the same was sent to them, gave notice of appeal against the order of removal, which was received by the overseers of Kelvedon; and with such notice of appeal the overseers of Colsterworth sent a statement in writing of the grounds of such appeal, as directed by the 79th and 81st sections of the 4 & 5 Will. 4, c. 76, which statement was also received by the overseers of Kelvedon.

The statement of the grounds of such appeal was as follows:—“That the father of the pauper *James Bird* never was legally settled in our parish of Colsterworth, nor was there ever a certificate granted by our parish of Colsterworth, owing the pauper’s father to be legally settled in

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our said parish of Colsterworth, as in the examination in this case is stated; and take notice, that, at the trial of the appeal, we mean to avail ourselves of both or one of the said grounds in support of the said appeal."

The appeal came on for trial at the Essex Easter sessions in 1835, and the respondent's counsel proposed to prove a settlement gained by the pauper's father in the parish of Colsterworth by apprenticeship; upon which it was objected, by the counsel for the appellant parish, that such evidence could not be received, on the ground that the respondent parish was not at liberty, under the 81st section of the 4 & 5 Will. 4, c. 76, to give evidence of any other grounds of removal than those set forth in the order of removal and examination; and that it was not stated in the order of removal or examination, as a ground of removal, that the pauper's father had acquired a settlement by apprenticeship in the parish of Colsterworth. The Court of Quarter Sessions, upon this, decided that the respondent parish was not at liberty to give evidence of the pauper's father having gained a settlement in the appellant parish by apprenticeship, and quashed the order of removal. If the Court should be of opinion that the respondent parish was not at liberty to give such evidence, the order of sessions is to be confirmed; otherwise it is to be quashed, and the appeal is to be sent back to the sessions to be tried.

Sir *W. W. Follett*, *Ryland* and *A. S. Dowling*, in support of the order of sessions. The question in this case is a very important one for the regulation of the practice of the quarter sessions under the new Poor Law Amendment Act (a). It turns upon the construction of three sections, viz. the 79th, the 80th, and the 81st (b), and the question

(a) 4 & 5 Will. 4, c. 76.

(b) Sect. 79 enacts, that no poor person shall be removed or removable, under any order of removal from any parish, or workhouse, by reason of his being chargeable to or relieved therein, until twenty-one

days after a notice in writing of his being so chargeable or relieved, accompanied by a copy or counterpart of the order of removal of such person, and by a copy of the examination upon which such order was made, shall have been

is, what is the meaning of the proviso in the 81st section, that the respondent shall not give evidence of any other grounds of removal than those set forth in the order and examination. The point has already been before the Court in *The King v. The Justices of Cornwall (a)*.—[Coleridge J. The question there was, as to the sufficiency of the state-

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sent, by post or otherwise, by the overseers of the parish obtaining such order, to the overseers of the parish to whom such order shall be directed: provided always, that if such overseers shall, by writing under their hands, agree to submit to such order, and to receive such poor person, it shall be lawful to remove such poor person according to the tenor of such order, although the said period of twenty-one days may not have elapsed: provided always, that if notice of appeal against such order of removal shall be received by the overseers or guardians of the parish from which such poor person is directed in such order to be removed within the said period of twenty-one days, it shall not be lawful to remove such poor person until after the time for prosecuting such appeal shall have expired; or in case such appeal shall be duly prosecuted, until after the final termination of such appeal.

Sect. 80. That the overseers of the parish giving such notice of appeal, or their attorney, or any other person authorized by them, shall, until such appeal shall have been heard and decided, at all proper times have free access to such poor person for the purpose of examining him touching his settlement; and in case it shall be necessary for the more effectual

examination of such person that he should be taken out of the removing parish, such overseers shall be permitted to remove him therefrom for the time which may be necessary for that purpose: provided always, that the expense of such removal, and his maintenance during the same, shall be defrayed by the appellant parish.

Sect. 81. That in every case where notice of appeal against such order shall be given, the overseer of the parish appealing against such order, shall, with such notice, or fourteen days at least before the first day of the sessions at which such appeal is intended to be tried, send or deliver to the overseers of the respondent parish a statement in writing, under their hands, of the grounds of such appeal; and it shall not be lawful for the overseers of such appellant parish to be heard in support of such appeal, unless such notice and statement shall have been so given as aforesaid: provided always, that it shall not be lawful for the respondent or appellant parish, on the hearing of any appeal, to go into or give evidence of any other grounds of removal, or of appeal against any order of removal, than those set forth in such respective order, examination, or statement as aforesaid.

(a) See *post*, 144.

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ment of the grounds of appeal, but that is not the point here.]—The question here is, what is the information that the legislature intended should be conveyed to the other party? It is quite clear, that it was intended a full disclosure should be made by each. It therefore was the duty of the magistrates, who took the examination, to elicit a full statement as to the settlement of the pauper. What information is conveyed in the order of removal and examination here? None. The pauper states, that he believes his father belonged to Colsterworth, and that he had heard him say he had a certificate from that parish; what notice does that give to Kelvedon of an intention to prove an apprenticeship of the father in Colsterworth?—[*Coleridge J.* The appellant parish clearly contemplated two branches of evidence being brought against them at the hearing, for they say, they rely on negativing one, or both.] It must be admitted that the case of *The King v. The Justices of Cornwall* (a) makes against the view now urged; for, although it was contended there, that the statement of the grounds of appeal must show specifically the settlement intended to be relied upon by the appellants; the Court held, that stating a pauper to be settled in a particular parish was a sufficient statement of the grounds of appeal, without shewing how he was settled; but it is submitted that such a decision is contrary to the spirit of the act, and cannot be upheld.

Knox and *Turner*, contra, were not called upon.

LORD DENMAN C. J.—I am of opinion that the respondents have done all that is required by the act, and therefore the order of sessions must be quashed. The act gives the magistrates credit for setting out a perfect settlement of the pauper on the order of removal and examination; and that, with the notice of chargeability required by the 79th

(a) See *post*, 144, and Arch. Quar. Sess. 125, 278.

section, gives sufficient notice of the case to the other side. The legislature might have imposed upon the respondent parish the same duty as they have upon the appellant. They might have required a more specific statement of the kind of settlement, but they have not done so: and for this clear reason, that the appellants know the grounds on which they mean to rely on their appeal, and therefore they are bound to state them. The examination is taken by the magistrates, and is not the act of the respondents; an objection to the examination, therefore, is not an objection to the conduct of the respondents.

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PATTERSON J.—I am of the same opinion. The notice of appeal says, that the father was not legally settled in their parish, how then can proof of any description of settlement in that parish be a surprise upon them?

WILLIAMS J.—Whether or not the examination was properly conducted, is a question the Court have nothing to do with. Perhaps it would have been better if it had stated the settlement of the pauper with more particularity. But the examination of the pauper was taken, and the order and notice required by the act sent. In that examination the pauper is stated to be settled in Colsterworth,—can it be said that they travel out of the notice, when particular evidence was given of what was there generally alleged?

COLERIDGE J.—I am of the same opinion, and will only add, that there is a great difference in the language of the act with respect to the notice to be given by the respondents, and with regard to that to be given by the appellants. It is to be presumed that the difference is intentional. The respondents obtain the order of removal upon an examination taken by the magistrates; a copy of that order and examination, with the notice of chargeability, is all they are required to send to the other parish. The statute takes care that the appellants shall not be prejudiced by any

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generality of statement in the examination, for the 79th section provides, that the pauper shall not be removed for twenty-one days after notice that the pauper is chargeable, and the copy of the examination has been sent. And then, as the 80th section gives the appellant free access to the pauper, to examine him touching his settlement, if any ambiguity should appear on the face of the examination, the whole of the case can be elicited from the pauper. But, as the grounds of appeal can only be known by the appellants themselves, the act very properly requires them to particularize them all, in their notice. Therefore it appears to me that the statute was made with very different purposes as to the notices to be given by each side.

Order of Sessions quashed.

The case to go back to be re-heard.

REX v. The Justices of CORNWALL, in the matter of an Appeal between the Parish of St. Glauvius and the Borough of Penryn (a).

It is a sufficient statement of the ground of appeal against an order of removal, to say, that the party is settled in a particular parish, without specifying the species of settlement which the pauper has acquired.

IN Easter term last a rule nisi was obtained by Sir *W. W. Follett*, for a mandamus, commanding the justices of Cornwall to enter continuances to the next general quarter sessions for the said county, and hear the appeal of the churchwardens and overseers of the parish of St. Glauvius, against an order of two justices for the borough of Penryn, for the removal of *Charles Halvoso* and *Charlotte* his wife, and her three children by a former husband, from Penryn to St. Glauvius. The affidavits disclosed the following circumstances :—

The paupers resided in the borough of Penryn, and became chargeable there. The pauper, *Charles Halvoso*, and

(a) This case was argued and decided in Trinity term last.

his wife, were examined before the magistrates of Penryn. The husband stated before them, that when he was about sixteen he bound himself apprentice to one *Bolitho*, and lived during the period of his apprenticeship in the parish of St. Glauvius; that he had duly served that apprenticeship, and had done no act to gain a settlement elsewhere; and that when he married his wife, in September last, she had three children by a former husband. The wife stated, that her former husband belonged to Penryn, and that by him she had three children under the age of thirteen years, who lived with her and her husband, and that they had done no act to gain a settlement in their own right.

The order of removal stated, that complaint had been made that *Charles Halvoso*, and *Charlotte* his wife, and *W., A., and E.*, son and daughters of the said *Charlotte*, by a former husband, neither of which said children had gained a settlement in his or her own right, had come to inhabit in Penryn, the said *Halvoso* and his wife not having gained a legal settlement there, or produced any certificate owning them to be settled elsewhere; and that the said *Halvoso* and his wife, and her children, were actually chargeable to Penryn;—and adjudged that the lawful settlement of ~~them~~, the said *Halvoso* and his wife, was in St. Glauvius, and required the churchwardens &c., of Penryn, to convey “the said *Halvoso* and his wife, and her children, as part of the family of the said *Halvoso*, from Penryn to St. Glauvius.”

Notice of appeal was given by the parish of St. Glauvius. The following were stated as the grounds of appeal, “That the said *Halvoso* was not bound an apprentice by indenture to *Bolitho*, and did not serve as such apprentice, as in the copy of his examination is stated, and that the said *Halvoso* is now settled in Penryn, and also that the said *W., A., and E.*, the son and daughters of the said *Charlotte*, by a former husband, *are, and each of them is, now settled in Penryn.*”

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The appeal came on to be tried at the sessions for Cornwall, when the respondents gave in evidence the indentures of apprenticeship, and proved the service under it in St. Glauvius, but the sessions refused to hear the evidence tendered by the appellants, to shew that the children were settled in Penryn, because it was not stated in the notice of appeal "*how* the children named in the order of removal were settled in the borough of Penryn." The sessions confirmed the order. Against the rule nisi for a mandamus,

Archbold now shewed cause. By the 57th section of the Poor Law Amendment Act, (5 & 6 W. 4, c. 76,) when a man marries a widow who has children, those children become part of the family of the husband until they attain the age of sixteen. These children were therefore removable to St. Glauvius. [Lord Denman C. J.—The Court wish you to confine your argument to the question as to the sufficiency of the statement of the grounds of appeal.] The statement of the grounds of appeal is insufficient; and the sessions were therefore justified in refusing to hear the evidence on the part of the appellants. By the 81st section of the Poor Law Amendment Act, a statement of the ground of appeal is to be given by the appellant parish, and on the hearing of the appeal, no evidence of any other grounds of appeal than those set forth in the statement is to be gone into. The notice ought to have stated whether the children *had gained* a settlement in their own right, or in right of their father; and it ought to have been stated by what mode the settlement was gained, whether by hiring and service, or by apprenticeship, or by serving an office. [*Littledale* J. There are frequently very nice questions of law, whether a party has entered into a contract of hiring, or of apprenticeship.] One great object of the Poor Law Amendment Act was to prevent litigation; and to effectuate that object, the 79th section provides, that no poor person shall be removed until twenty-

one days after notice in writing of his being chargeable, accompanied by a copy of his examination, shall have been sent to the overseers of the parish to which it is intended to remove him. This gives to the latter parish full information of the nature of the settlement upon which the *removing* parish relies, and will frequently save expense by preventing appeals. The object of the provision requiring the appellant parish to give a statement of the grounds of appeal is, that the respondent parish may have precise information as to the settlement intended to be set up by the *appellants*, and so be enabled to inquire into the truth of the statement, and abandon the order of removal, if the appeal be well founded. The statute which regulates the appeals against poor's rates requires the causes and grounds of appeal to be stated in the notice, and it has been held, that it is not sufficient to say that several persons have been omitted. The provisions in this act with respect to the statement of the grounds of appeal, will be entirely nugatory, if a notice so general in its terms as the present be held sufficient.

Sir *W. W. Follett*, in support of the rule. The notice of appeal was, under the circumstances, sufficiently precise. It must be considered in connection with the order and the examinations, for it has reference to, and negatives, the statements which they contain. If so considered, it will be sufficiently obvious what was the nature of the settlement intended to be set up in Penryn. The examination of the wife states that her former husband was settled in the borough of Penryn, and that they have done no act to gain a settlement in their own right. The order adjudicates their settlement to be in Penryn, and the notice denies the settlement which the respondents set up.

Lord DENMAN C. J.—This rule must be made absolute. The justices have declined to hear important evi-

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dence. The appellants gave notice that they meant to dispute the order, in consequence of the children being settled in Penryn. It is contended by Sir *W. Follett*, that taking the examination and order with the notice, it is sufficient, and that it may be considered that the appellants merely took up the words of the respondents, and that therefore it was enough for them merely to state that the children were not settled in Penryn. But without putting our judgment on that ground, it seems to me that we had better state at once that there was sufficient information given by the notice itself in the present case. When the officers of a parish give notice that they mean to dispute the propriety of an order of removal, in consequence of the pauper being settled in a particular parish, that is sufficient, since it enables the other side to make inquiries.

LITLEDAL J.—This notice of appeal is, in my opinion, sufficient. Before the present act it was sufficient to give the notice of appeal simply; now, the grounds of appeal must be stated. Formerly, when it was doubtful in which of three or four parishes a pauper was settled, the settlement in each parish might be gone into, by the appellants. Now, they must confine themselves to one parish.

PATTESON J. and WILLIAMS J. concurred.

Rule absolute (a).

(a) *N. R. Clarke*, in this term, moved for a rule nisi for a mandamus to the Justices of Derbyshire, to enter continuances and hear an appeal, in a case where the Sessions refused to hear evidence on a hiring and service set up by the appellants, on the ground that the notice of appeal did not

state with whom the service was; and he cited the above case from Arch. Quar. Sess. 278; but Lord Denman C. J. said—"We are not disposed to think the decision was right as stated in that report, but you may take a rule." See *The King v. The Inhabitants of Kelvedon*, ante, 138.



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BY an order of two justices, *Robert Dickinson Lynn* was removed from the parish of Asterby, in Lincolnshire, to the parish of Billingham, in the same county. The Court of Quarter Sessions confirmed the order, subject to the opinion of this Court on the following case, which was drawn by the chairman.

The pauper was bound apprentice by indenture for the term of five years to *Robert Lund* of Billingham, wheelwright, and served him at Billingham under these indentures for one year and eight months. The indentures were then cancelled, the pauper's father having bought up the remainder of the time. The pauper afterwards, having first gone upon liking, let himself under a written agreement to *Robert Medley* of North Rancely, wheelwright, which is signed by the pauper's father, *Robert Medley*, and the pauper, and is in the following words:

"Memorandum, that the undersigned *Robert Lynn* agrees on behalf of his son *Robert Lynn*, that he shall serve *Robert Medley* of North Rancely, in his business of a wheelwright, from this time to the twenty-seventh of March, one thousand eight hundred and thirty, the said *Robert Medley* paying, at the expiration of the said term, five pounds to the said *Robert Lynn* the younger, *Robert Lynn* to find his son clothes, washing, and all other necessaries, and *Robert Medley* meat, drink, and lodging. Witness our hands this third day of December, one thousand eight hundred and twenty-seven. *Robert Lynn. Robert Lynn. Robert Medley.*"

The pauper stated that he served as an apprentice.

The respondents proposed to give in evidence, conversations between the parties before and at the time of signing the instrument, but the Court refused to admit the evidence.

opinion of the Court of K. B. stated that on the trial of an appeal respecting the settlement of a pauper, the respondents proposed to give in evidence conversations between the parties to a written agreement before and at the time of signing the instrument, but the case did not state what those conversations were, but it did distinctly state as a question for the opinion of the court, whether the agreement was a contract of hiring,—the Court of K. B. refused to send the case to be restated.

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1. A verbal contract of hiring, is a question of fact for the determination of the sessions.

2. A written contract of hiring is a question of law, upon which the Court of Quarter Sessions may take the opinion of the Court of King's Bench.

3. *L.* agreed on behalf of his son, that he should serve *M.* from the date of the agreement until a certain specified time, *M.* paying, at the expiration of the said term, five pounds to the son; *L.* to find his son clothes, washing, and all other necessaries, and *M.* meat, drink, and lodging:—Held, that this was a contract of hiring, and not of apprenticeship.

4. Where a case sent by the Court of Quarter Sessions for the

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The respondents also proposed to give in evidence the indorsement on the paper within which the agreement was written, but as it was not proved that the indorsement was on the paper at the time the agreement was signed, the Court refused to admit the evidence.

If the Court of King's Bench shall be of opinion that the agreement was an agreement of hiring and service, the order of sessions is to be quashed, otherwise to be confirmed.

First point.

The order of
Sessions sub-
stantially
right.

Whately and *Whitehurst*, in support of the order of sessions. The case is not clearly stated, but sufficient appears upon the face of it to warrant this Court in confirming the order of sessions, or at all events the case must be sent down to be reheard, as the sessions rejected evidence which they ought to have received. [Lord *Denman* C. J. The only question submitted to us by the sessions is, whether this agreement is an agreement of hiring and service, and if we are of opinion that it is, the order of sessions must be quashed.] The Court of Quarter Sessions has no power to tie down this Court by any such question, nor to state a case for the opinion of this Court as a case. The Crown could not constitute a Court with such power. The order of Sessions should be confirmed if it appears the decision was right, although with respect to the question stated by them for the consideration of this Court, they may have decided erroneously. The Court of Quarter Sessions may, if they please, instead of simply giving judgment that an order be quashed or confirmed, add their reasons upon the face of the judgment, or in other words, draw up a *special judgment*, and then this Court, by its general superintending power over all inferior courts, will remove it here; and if it appears that the judgment is not warranted by the reasons given, will quash it—if it is warranted, will confirm it. It is in *effect* reserving a case, but in principle, this is the way all special cases from the sessions come before the Court; and it follows, that when the record is here, this Court not only may, but is

bound to look at the whole record or judgment, and, unless it appears that the sessions upon the whole have come to a wrong decision, ought to confirm their order. If that is so, it sufficiently appears that here, the sessions were right, for upon this record it is clear the pauper gained a settlement in the appellant parish; and that must prevail, unless it also *appears* that he gained a subsequent settlement by this supposed hiring and service. Clearly that does not appear; for to gain a settlement by hiring and service, there must be a service as *servant*. The words of the 3 & 4 W. & M. c. 11, s. 7, are "If any unmarried person shall be lawfully hired &c., *such* service shall be adjudged a good settlement."

But at all events it appears that the sessions have improperly rejected evidence, and the Court will send the case down again to be reheard. In the first place, they ought to have heard evidence to shew what was the true nature of the contract between the parties; for although the parties themselves might be estopped from denying the contract, or shewing it to be different from what it appears on the face of it, the overseers of the respondent parish are not. They had a right to shew it was not *bonâ fide*, or fraudulent so as to defraud the revenue, or merely colourable. This is proved by a series of cases, *Rex v. Highnam* (a), *Rex v. Laindon* (b), *Rex v. Scammonden* (c), *Rex v. North Wingfield* (d), *Rex v. Llangunnor* (e), *Rex v. Wickham* (f), *Rex v. Cheadle* (g). [Lord Denman C. J. It does not appear what the questions were, that were proposed to be put—they ought to have been stated.] It does not, and the case is no doubt in that respect imperfectly stated—they were taken down at the sessions, but the chairman who stated the case himself, left them out; however, there is enough to shew that some were improperly rejected, as the sessions rejected *all* the conversation, part of which took place at the time of the execution of the agreement,

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Second point:
Evidence im-
properly re-
jected.

(a) Bott. 501; Cald. 491, S. C.

(e) 2 B. & Ad. 616.

(b) 8 T. R. 379.

(f) 4 N. & M. 406; 2 Ad. & E.

(c) 3 T. R. 474.

517.

(d) 1 B. & Ad. 912.

(g) 3 B. & Ad. 833.

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Third point:
The contract
a defective
apprentice-
ship.

Fourth point:
Whether a
contract is
one of hiring
or a defective
apprentice-
ship, is a ques-
tion of fact.

which, at all events, ought to have been received—for to shew what passed at the execution of an instrument is the reason why the law requires the subscribing witness to be called, and every thing that passes at that time relevant to the subject-matter is evidence. Again, the indorsement was evidence—the instrument was produced by the opposite party, and must be taken to have been written at the same time as the rest of the paper. If not, the onus of proving that fact lay upon the party producing it; a party cannot put in one side or one part of a paper only, as for instance, a bill, and not the receipt at the foot or back of it.

The cases are very contradictory respecting what shall amount to a defective contract of apprenticeship, and what to a hiring and service; tests which have appeared conclusive to some learned judges, have appeared to others, of little weight. This case seems like to *Rex v. Highnam* (a), *Rex v. Laindon* (b), *Rex v. St. Margaret's*, *King's Lynn* (c), *Rex v. Edingale* (d), *Rex v. Combe* (e).

The truth is, the question is a question of fact, and not of law. Many cases have decided, that whether the words used by the parties do or do not constitute a hiring and service, is a question of fact for the sessions, and this Court have refused to interfere with their finding, though they have not concurred with it—whether the words in this written document, therefore, constitute a hiring and service, was for the sessions, and they have decided it, and this Court will not interfere. It makes no difference that it is in writing, all contracts (when ascertained) except by deed, are in the eye of the law equally parol contracts, and liable to the same interpretation.

White and Bourne, contrà, were stopped by the Court.

LORD DENMAN C. J.—I do not think there is any ground for doubt in this case. The sessions lay a particular instru-

(a) Bott. 501; S. C. Cald. 491. 10 B. & C. 739.

(b) 8 T. R. 397.

(c) 2 Man. & Ryl. 30; S. C. 8

(c) 6 B. & C. 97.

B. & C. 82.

(d) 5 Man. & Ryl. 648; S. C.

ment before us, and that being a written document, I think it is a question of law for us to say what is the effect of it. Hiring and service is a question of fact, where it is made *vivâ voce*; but if it depends altogether on a written paper, then I think it is open to the Court of Quarter Sessions to ask the opinion of the Court of King's Bench, whether the written paper constitutes a hiring. We cannot attend to any thing which has taken place at the sessions, which is not stated in the case. The Court of Quarter Sessions have only referred the question to us, whether the terms of the written instrument constitute a hiring? I think that this paper does constitute an agreement of hiring. It is a memorandum that the undersigned *R. L.* agrees, on behalf of his son, that he shall serve *R. M.* in his business of a wheelwright, from this time, the date of the agreement, to a period specified, *N.* paying at the expiration of the said term *5l.* to *L.* the father, and to find the son in meat, drink, and lodging. There is not a word there used about teaching, apprenticeship, or any thing of the sort. It has been urged that the case shews the sessions have done something clearly wrong, by refusing to receive evidence of conversations which took place at the time of signing the agreement. Evidence of such conversations may be admissible, or it may not. It is surely going a great deal too far, to say, that all a subscribing witness can prove as having passed in parol at the time of signing a written instrument is receivable in evidence. If it was desired to shew, as in some of the cases cited, that the indenture was a fraud, and was not the real contract between the parties, or that something was done with a view to defraud the revenue, or third party; then, extrinsic evidence is admissible for those purposes, but if the question with the sessions is, what is the effect of the contract (and that is what they have referred to us), then, out of that written contract we cannot go. If it had been suggested in the case, as it has been said it was at the sessions, that there were circumstances which made

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Fourth point.First and third
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the evidence admissible, then the question submitted to us should have been, not on the effect of this contract which comes here, but whether the circumstances were such, as to make that evidence admissible. We cannot assume that the sessions have rejected any thing which was properly receivable, unless they state what it is they rejected, and we must dispose of the case as we find it stated. I think, therefore, that there is nothing wrong on the face of this case, except the conclusion to which the sessions have come on the construction of the agreement, and therefore their order must be quashed.

· PATTESON J.—The sessions have to determine both the law and the fact. I do not agree to the proposition, that there is no difference between a written instrument and a verbal contract. When the contract is verbal, it is clearly a question of fact for the sessions. The construction of a written instrument is matter of law. The Court of Quarter Sessions has sent the written instrument to us. As to whether or not they were right in receiving or rejecting the evidence that was tendered, I profess to give no opinion whatever, because I do not think there are materials for forming an opinion. The case only says, it was proposed to give in evidence conversations before and at the time of signing the instrument. Some conversation between the parties at the time, might by possibility, under certain circumstances, be evidence. Most conversation would not be evidence. The sessions have not told us what the conversation was, and we cannot therefore form any opinion, as to how far it was receivable in evidence. With respect to the other part of the case, which states that evidence of the indorsement was rejected, a reason is given, (and a very good one) namely, that there was no proof that the indorsement was there at the time the document was signed, and that it could therefore have nothing to do with the document. The case comes to us nakedly on the construction of the instrument—on the face of which it appears

Fourth point.

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to be a contract of hiring and service, and therefore the sessions were wrong.

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First point.

Second point.

WILLIAMS J.—I am entirely of the same opinion, on the ground that the memorandum, as it is called, is in truth the subject which is submitted to our consideration by the sessions. I cannot conclude, that because the respondents proposed to give in evidence conversation between the parties before, and at the time of signing, the instrument, that it was therefore admissible in evidence at the sessions. That some part of it might have been, I can well understand. If I mistake not, a very early case, *The King v. Highnam* (a), (which was the origin of all these questions as to imperfect contracts of apprenticeship) was founded on the fact that the parties did not execute an indenture, because they wanted to save the stamp; and therefore that was powerful evidence to shew what was the meaning of it; but nothing at all appears on the face of this case, that any thing of that kind was proposed to be given in evidence at the sessions; if it had, it should have been stated. With regard to the main point which is submitted to us, I agree that this memorandum is an agreement of hiring and service, and nothing else.

Third point.

COLERIDGE J.—I am quite of the same opinion. I am as averse, as any body can be, to this Court interfering with the findings of fact by the Court of Quarter Sessions, and as averse, to this Court receiving from the quarter sessions any case which brings a mere matter of fact into discussion. The Court of Quarter Sessions sits both as judge and jury. But in every case in which that Court sits as judge, this Court, I apprehend, has very properly a revising power. The case the quarter sessions have submitted to us here, is the construction of a written agreement. If this case had been at a trial had at nisi prius, the judge would have been

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(a) Cald. 491; S. C. Bou. 501.

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- bound to tell the jury what the construction of that agreement was. Looking most strictly at it, I cannot but think the quarter sessions had a right to ask our opinion on that particular point. That being so, I think it never can be said the quarter sessions have found the fact. A reasonable interpretation must be given to what is stated on the case. The court of quarter sessions have found the fact, taking a particular view of the construction of the instrument in evidence, at the same time saying in substance, "We do not find the fact, if the Court should be of opinion our construction of that written instrument is not the right one." That brings the question before us—whether they have construed it rightly or not—and I agree with the rest of the Court in thinking they have not. With regard to the other point, viz. that the quarter sessions had found there was no service as a servant, although it is found in the case that the pauper stated he served as an apprentice, it does not follow the Court of Quarter Sessions adopted his view of the service. As to the rejection of evidence, I think,
- Fourth point.
- Third point.
- Second point.
- as this case is stated, we cannot decide that the evidence was improperly rejected, unless we are prepared to say that all conversation before and at the time of signing an agreement, and all indorsements on the back of an instrument, must of necessity be evidence. The case is so meagrely stated to us, not informing us what the particular conversation or particular indorsement was, that we have no means of forming a judgment as to the admissibility of the evidence. I entirely agree with my lord in the view that the cases cited will not, on examination, be found applicable to this particular point. They were none of them cases in which parol evidence was received for the purpose of explaining the nature of a written agreement. The evidence given in them, was either to shew some additional consideration, which is always understood to be an excepted point, or to explain the meaning of terms used. Parol evidence of some additional consideration, besides what is stated in the deed, if it is not inconsistent with the consideration there stated, is admissible. That was

the case of *The King v. North Wingfield* (a), where, in addition to a pecuniary consideration, it was sought to ingraft on it a consideration of cohabitation. So again, with regard to the cases of *Rex v. Llangunnor* (b), and *Rex v. Cheadle* (c), it was not to explain the meaning or add to the terms of any written instrument; but in the former, admitting the instrument spoke the truth, yet that the money paid was parish money, and therefore no stamp was necessary; and in the latter the evidence was given to shew that the money stated in the deed to be paid, was never paid or intended to be paid.

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Order of Sessions quashed.

(a) 1 B. & Ad. 912.

(c) 3 B. & Ad. 833.

(b) 2 B. & Ad. 616.

**THE KING v. THE TRUSTEES OF THE GREAT DOVER
STREET ROAD.**

Wednesday,
Nov. 16th.

THIS was an appeal by the trustees of the Great Dover Street Road against a rate made for the relief of the poor of the parish of St. Mary, Newington, in the county of Surrey. The amount of the rate was 76*l.* 13*s.* 4*d.*, calculated upon a rent of 1150*l.*, made upon the trustees for land which they had made a road. The Court of Quarter Sessions confirmed the rate, subject to the opinion of this Court on the following case:—

By 49 *Geo.* 3, c. clxxxvi, intituled “An Act for making and maintaining a Road from the Borough of Southwark to the Kent Road, in the county of Surrey,” after reciting that the making of a broad and commodious communication between the Borough of Southwark, from near St. George’s Church, to near the Bricklayers’ Arms public house, in the Kent Road, would be attended with great advantage, certain persons, in the act named, were appointed trustees to execute the same; and they and their successors were empowered to receive certain specified tolls, and were di-

The 51st section of the General Turnpike Act (3 *Geo.* 4, c. 126,) which exempts all persons from assessment to the poor’s rate in respect of tolls or toll-houses, applies to the trustees of the tolls of a road made under a local act; although they are beneficially interested in the receipt of the tolls, and although some of the provisions of the local act are inconsistent with the General Act.

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rected to apply the monies received under the act towards the payment of the interest of a sum of money advanced by shareholders or subscribers for the purpose of carrying the act into execution, to the putting of the act into execution, and to the repayment of the principal sum so advanced. Powers were also given to the trustees, for the purpose of making and improving the road, to treat and agree for the purchase of all the houses and lands along the line of road, and to treat for the loss and damage which the persons interested therein should sustain. Powers were also given to the owners, interested in any lands on the line of the intended road, to sell them to the trustees.

The 101st section of the act directed that the said trustees should pay to the churchwardens and overseers of the respondent parish such annual sums as at the passing of the act were payable as parochial rates, in respect of houses which might be pulled down for the purpose of carrying the act into execution; but it was provided that such payment should cease when and so soon as a sufficient number of houses should be erected and built on the sides of the then intended road, and should be rated on the respondent parish, and the rates thereof should amount to as much as the rates imposed on the houses pulled down for the purposes aforesaid. It was further enacted, that that act, and all the tolls thereby granted, should continue, from the passing of the act, for the term of twenty-one years.

The above-mentioned act was, in certain respects not material to be noticed, amended by an act passed in the 51 *Geo. 3*, c. clxxv.

By a statute (local) 10 *Geo. 4*, c. cxlii, passed on 1st June, 1829, after reciting the passing of the act 40 *Geo. 3*, c. clxxxvi, and the 51 *Geo. 3*, c. clxxv, and that the sum of 34,648*l.* 12*s.* 4*d.* of the subscriptions made in pursuance of the provisions of those acts had been expended for the purposes therein mentioned, but that the amount of tolls received upon the said road had not been sufficient, after defraying the necessary charges of making and maintaining the same,

to pay the subscribers in any one instance more than at the rate of 3*l*. 15*s*. per centum per annum, and that the average payments of interest had been less than 3*l*. per cent. per annum, so that the trustees had been unable to repay the subscribers; and that for the purpose of enabling the said trustees to continue the payments of interest, or dividends, to the subscribers, and to repay the several sums subscribed for making the said road, it was expedient that the term granted by the 49 Geo. 3, should be further continued, and that the said recited acts should be repealed, and other powers granted instead thereof, the said recited acts were declared to be repealed. By the said act (the 10 Geo. 4), certain persons therein named, some of whom were the trustees then in office under the former acts, and their successors, being duly qualified to be elected as hereinafter mentioned, were appointed trustees for putting the act in execution; it being declared, amongst other qualifications, that no person should be capable of being elected, or of acting as a trustee in the execution of the act, unless at the time of acting in his own right, or in right of his wife, he should be possessed of, or entitled to, five shares at the least in the capital stock raised for making the said road, and in the actual receipt of the interest and dividends thereof.

The act also authorized the trustees to take certain tolls at all toll-gates, bars, or turnpikes, and toll-houses, then or thereafter to be erected in or upon, or across, the said road, for horses, cattle, or carriages passing through the same. But it was by the 12th section of the act declared, that the justices of the peace, assembled at the Easter quarter sessions for the county of Surrey, should examine the accounts of the trustees, and have power to order the tolls to cease, if it appeared to the justices that the purposes of the act had been carried into effect. And it was further enacted, that all the tolls and monies raised by virtue of the recited acts, and then in the treasurer's hands, and all the tolls and monies to arise thereafter by virtue of the act, should be

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applied in the first place, and in preference to all other payments, in defraying the expenses of obtaining the act, in continuing, erecting, supporting, and lighting the several toll-gates, bars, turnpikes, toll-houses, and direction-posts, to be continued, erected, supported, or lighted by virtue of the act, and in paying the salaries and allowances to the several clerks, collectors, and other officers and servants to be employed under the act; and out of the surplus of such payments to pay, until the sums of money subscribed for making the said road should be returned to the persons entitled to receive the same, interest at the rate of 5*l.* per centum per annum, upon all principal sum or sums of money which had been subscribed; and that the trustees should then apply the residue of the monies arising from the said tolls in repaying the several subscribers the monies respectively subscribed towards making the said road, by virtue of the shares in the said road belonging to such subscribers respectively, and for no other use or purpose whatsoever. And it was enacted, that when and so often as the surplus of the tolls applicable to the repayment of any part of the said sum of 34,648*l.* 12*s.* 4*d.* should amount to the sum of 500*l.*, the said trustees, at their next meeting, should proceed to decide, by lot, to which of the subscribers of and towards the said sum of 34,648*l.* 12*s.* 4*d.* the shares to be paid off should belong. And it was enacted, that so soon as the said sum of 34,648*l.* 12*s.* 4*d.* subscribed for the making of the said road should be so paid to the proprietors of the shares of the said undertaking, all tolls on the said road should cease, and the toll-gates, toll-houses, and other erections on the said road erected and set up by the trustees, should forthwith be taken down, and the materials sold, and the money applied to the purpose of the act; and from and immediately after such sale the powers granted should cease, and the said act should be and become void and of no effect, as if the same had been repealed: provided, that in case the said sum should not be wholly repaid, then the act should continue in force for the term of thirty-one years,

and from thence until the end of the then next session of parliament, and no longer.

In pursuance of the powers conferred by 49 *Geo. 3*, the trustees appointed under that act obtained conveyances of the lands and buildings along the intended line of the road, of which they took possession, and made and completed Great Dover Street, and they erected toll-bars across the same; and they and the present trustees, under the authority of the act, have appointed toll-collectors, through whom they have received the tolls paid at the said gates.

In order to complete the road, certain houses were pulled down under the authority of the first-mentioned act; but after the passing thereof, and long prior to the making of the rate appealed against, many new houses were built, and are now standing along the side of the road, and were and are rated to and by the respondent parish; the rates whereof amounted to more money than the rates imposed on the old houses so pulled down.

The former trustees repaired the road, and that part of it which is situated in the parish of St. Mary, Newington; but since the act 11 *Geo. 4*, c. xlv, (which was a public act for paving, lighting, cleansing, and otherwise improving such part of Great Dover Street, Trinity Street, Trinity Square, and the highways, roads, streets, markets, and other public passages and places leading out thereof, or abutting thereon, or adjacent thereto, all within the parishes of St. Mary, Newington, and St. George the Martyr, Southwark, in the county of Surrey, as do not fall within the powers and provisions of any existing acts of parliament,) the necessary repairs to the roads have been done by the commissioners acting under the authority of the last-mentioned act, who have raised the sum of 470*l.* by rates assessed upon the inhabitants of the parish occupying premises on the line of the road so repaired: in respect to such repairs the total number of shares subscribed for, and which constituted the capital mentioned in the act for making and maintaining the

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said road in question, is 492, of which number 259 shares are held by the trustees.

The entire amount of tolls ever received has not been sufficient, after deducting the necessary expenses, to enable the trustees to pay off any part of the capital or principal sum subscribed, or to keep down the amount of interest thereon, calculated at the rate of 5*l.* per cent. per annum; but the whole of the principal sum is now due. (The case then set out an account, which it is not necessary to detail.) The occupiers of rateable property in the parish are rated at four-fifths of the average annual value of the proprietors in their occupation. The respondents have rated the appellants in the sum of 1150*l.* on their total profits for the year ending December, 1831; which is less than four-fifths of the annual average of tolls received by the trustees, after deducting the expenses before mentioned. The appellants resist the rate on the following grounds.

First. That they are not liable to be rated at all, not being the beneficial occupiers of any property within the parish.

Secondly. That they are expressly exempted from liability to be rated, by virtue of the General Turnpike Act, 3 *Geo.* 4, c. 126, and particularly by the 4th and 51st sections of the same act, and by the amended General Turnpike Act, 4th *Geo.* 4, c. 95; and particularly the 31st section of the last-mentioned act.

Thirdly. That if liable to be rated at all, they are only liable to be rated in respect of their own shares.

If the Court shall be of opinion that the appellants are not liable to be rated at all, the rate is to be quashed. If the Court shall be of opinion that the trustees are liable to be rated in respect of four-fifths of the average annual balance received by the trustees during the two years next preceding the making the rate, after deducting the expenses in that behalf before mentioned, the rate is to be confirmed. If the Court shall be of opinion that the trustees are liable to be rated, but only upon the average annual amount of

interest paid to or retained by themselves upon their own shares, then the rate is to be amended by reducing the sum at which the appellants are assessed, from the sum of 1150*l.* to the sum of 898*l.* 10*s.* 3*d.*

Theniger and *M. Chambers* in support of the order of sessions.

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I. The first point to be considered is, are the persons rated merely trustees, or are they to be considered as parties beneficially interested in the property rated? It is clear that they are beneficially interested, for they have received many hundred pounds as the interest on their shares; and it has been held, that the slightest beneficial interest creates a liability to be rated; *Rex v. Munday(a)*, *Rex v. Terrott(b)*. This case differs from *Rex v. The Inhabitants of Liverpool(c)*, *Rex v. The Commissioners of Sulter's Load Sluice(d)*, and *Rex v. Trustees of the River Weaver Navigation(e)*; because in all those cases the dues or tolls received were applicable to public purposes only; but it is not distinguishable from *Rex v. The Hull Dock Company(f)*, where the company was held rateable, because they were entitled to any surplus dividend which might arise after payment of expenses in repairs.

First point.
The appellants
beneficially
interested.

II. *Rex v. Barnes(g)* is a more recent case, to the same point; and is also an answer to an objection that may be made, that the trustees are not occupiers of land.

Second point.
The appellants
are occupiers
of land.

III. Are the trustees exempted by the provisions of the General Turnpike Acts? The 3 *Geo.* 4, c. 126, s. 4, enacts, that the act shall apply to all acts of parliament then in force, or which should be made for making, widening, turning, amending, repairing, or maintaining any turnpike road in England; and section 51, enacts, that no person, in respect of tolls or toll-house, shall be rated toward the payment of poors'-rates. The same provisions are re-

Third point.
The appellants
not exempted
by the General
Turnpike Act.

(a) 1 East, 584.

(e) 7 B. & C. 70, in note.

(b) 3 East, 506.

(f) 5 M. & S. 394.

(c) 9 D. & R. 780; S.C. 7 B. & C. 61.

(g) 9 D. & R. 788; S.C. 1 B. & Ad. 113.

(d) 4 T. R. 730.

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peated in the amended General Turnpike Act(a). But it is submitted, that the General Turnpike Act applies to turnpike roads, in which the public interest only is to be considered, and not to roads like the present undertaking, a mere speculation by individuals; and which is not a turnpike road in the legal sense of the word, and does not fall within the principle to exempt the tolls taken upon it from poor's-rate. That principle was stated by *Lawrence J.* in *Rex v. Staffordshire Canal Navigation*(b). "In the case of a turnpike, tolls are paid for the benefit of the public, and not for the use of any individuals; and those tolls are not the subject of taxation, within the statute of 43 *Eliz.*" The intention of the legislature not to apply the General Turnpike Acts to the Dover Street Road, is also clear from this, that the provisions contained in them are quite inconsistent with the provisions in the local act. Thus section 61, of the General Act(c) provides, that all justices of the peace acting for the county through which the turnpike road passes, shall be added to the number of the trustees *for making, repairing, or maintaining every such turnpike road.* Such an increase of trustees would make it nearly impossible to carry on the trust. In section 62, a different qualification is required in trustees, and section 65, is quite conclusive upon the point; for it enacts, that no trustee should act as trustee in any matter in which he shall be interested, nor receive any sum of money out of the tolls, &c., under penalty of 100*l.*; while the local act(d) provides, that no person shall be capable of acting unless he shall be possessed of five shares at least in the capital stock raised for making the road, and be in the receipt of the interest and dividends therefrom. It is clear, therefore, that this road is not a turnpike road, within the meaning of the General Act. The land here is vested in the trustees, not for public purposes, but for their own private interests; and it could never have been intended to exempt such a beneficial interest as this from being rated.

(a) 4 *Geo.* 4, c. 95, s. 31.

(c) 3 *Geo.* 4, c. 126.

(b) 8 T. R. 350.

(d) 10 *Geo.* 4, c. 113, s. 3.

IV. If that be so, there is no difficulty as to the mode of rating them; as several cases shew, that the trustees who receive the profits in the first instance are the parties to be rated; and that it is not necessary to seek out the cestui que trust, to whom the profits ultimately go. *Rex v. Agar (a)*, *Rex v. Tewkesbury (b)*, *Rex v. Sudbury (c)*, *Rex v. Trustees of the River Weaver Navigation (d)*.

D. Pollock, Barnewall, and Channell, who were to have argued contra, were not called upon by the Court.

LORD DENMAN C. J.—I do not apprehend there can be a turnpike road in the kingdom, if this is not one, both in the popular and legal sense of the term. If that be so, the tolls taken on this road fall expressly within that clause of the General Turnpike Act, which exempts such tolls from poors'-rate. If any difficulty had been pointed out in carrying that clause into effect, by shewing that its provisions are inconsistent with the provisions of the local act, we might have been compelled to look more closely into the two statutes; but to speculate now on supposed inconsistencies which may exist between other provisions of the two acts, would be to enter upon the province of legislation, with which we have nothing to do.

PATTESON J.—It seems to me the only question is, whether Dover Street is a turnpike road or not; if it be a turnpike road (of which there can be no doubt), then the provisions of the General Turnpike Act are applicable to it as far as they can be applied. Whether all the provisions are applicable or not is immaterial to the present question.

WILLIAMS J. concurred.

(a) 14 East, 256.

(b) 13 East, 155.

(c) 2 D. & R. 151; 1 B. & C.

389, S. C.

(d) 7 B. & C. 70, in note.

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Fourth point.
The trustees,
and not the
cestui que
trusts, the
parties to be
rated.

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COLERIDGE J.—I am quite of the same opinion. The basis of the argument to-day has been founded on a supposed difference between the situation of these trustees and the ordinary trustees of turnpike roads, in order to shew that the latter are not rateable, because they are mere trustees for the public. But how would that argument apply to a case which must constantly arise, when a mortgagee of tolls brings ejectment, and obtains possession of the toll-houses and tolls. It cannot be said that he is not a beneficial occupier; but could it be contended that he is not expressly within both the words and the provisions of the 51st section of the General Act?

Order of Sessions quashed.

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The KING v. The Inhabitants of BOBBING.

1. A pauper was appointed parish clerk, by the rector of the parish, in the following manner:—The rector sent for the pauper, on a Sunday, and requested him to perform duty on that day, and on coming out of the desk the rector said to the pauper, "I shall appoint you my regular clerk and sexton, and to follow me in

funerals and marriages."—Held, that this was a proper appointment of the pauper as parish clerk, and that he gained a settlement by serving the office.

2. *Quare*, whether, by the canon, it is necessary that the appointment of a parish clerk should be signified to the parishioners.

ON appeal against an order of removal, whereby *Henry Smart* and his wife were removed from the parish of *Barming*, in the county of *Kent*, to the parish of *Bobbing*, in the same county, against which order the latter parish appealed, the Court of Quarter Sessions confirmed the order, subject to the opinion of the Court of King's Bench upon the following case:—

The pauper, *Henry Smart*, being settled in *Bobbing*, went, about Michaelmas, 1797, to reside in the parish of *Barming*, and continued to reside there until he was removed by the present order.

In the year 1811 the offices of parish clerk and sexton of *Barming* became vacant, and the Rev. Mr. *Noble*, who was then rector of the parish, sent for the pauper, on a Sunday

in that year, and requested him to perform the duty of clerk for that day. The pauper did so, and Mr. *Noble*, on coming out of the desk, said to the pauper, "I shall appoint you my regular clerk and sexton, and to follow me in marriages and funerals." The pauper thereupon, without any thing further being said or done, entered upon the execution of the duties of the said offices, and continued to perform all the duties, and to receive the emoluments, of those offices from thence until 1833.

Soon after the pauper entered upon the offices as above-mentioned, two of the principal inhabitants objected to what the rector had done, inasmuch as the pauper was not a settled parishioner of Barming; but the rector said, the pauper was the fittest person he could find, and that he should, therefore, persist in what he had done. There was a salary of one shilling per week attached to the offices, which had been paid by the parish to the person who had formerly filled them, and which the pauper applied for at the end of the first year. The overseer to whom he applied at first refused to pay him the salary, assigning as a reason that the pauper was not settled in the parish; but the rector having threatened to take legal proceedings against the parish officers, the salary was paid to the pauper by the overseer, and was continued to be paid by the parish to him for four or five years, without any objection on the part of the parish. At the end of that period the pauper applied to the parish for an increase of salary, and the subject having been taken into consideration at a vestry meeting of the parishioners, it was, at such vestry meeting, agreed to raise the salary to one shilling and sixpence per week, and at this rate the pauper was paid during the remainder of the term he executed the offices.

The question for the opinion of the Court is, whether, under the above circumstances, the pauper gained a settlement in the parish of Barming? If so, the order of sessions to be quashed; if otherwise, to stand confirmed.

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Bobbins.

D. Pollock, in support of the order of sessions. The sole question for the consideration of the Court is, whether the pauper was properly appointed to the office of parish clerk? because, if he was properly appointed, there is no doubt, according to *Rex v. Stogursey (a)*, he would gain a settlement by executing the office. By canon 91 (*b*), "No parish clerk, upon any vacation, shall be chosen within the city of London or elsewhere, but by the parson or vicar, or, where there is no parson or vicar, by the minister of that place for the time being; which choice shall be signified by the said minister, vicar, or parson to the parishioners, the next Sunday following, in the time of divine service." In the present case there was no signification of the appointment to the parishioners, and therefore it was invalid.

Bodkin and *Deedes*, who were to have argued contra, were stopped by the Court, after having cited *Gutton v. Milwich (c)*.

LORD DENMAN C. J.—I doubt much whether any mention to the parish is necessary by the canon. Here there was a proper appointment.

PATTESON, WILLIAMS, and COLERIDGE, Js., concurred.

Order of Sessions quashed.

(a) 1 B. & Adol. 795.

"Parish Clerk," p. 63, 5th ed.

(b) 3 Burn's Eccl. Law, title

(c) 2 Salk. 536.

Thursday,
Nov. 17th.

GRINDELL v. GODMAND.

Assumpsit, in
the absence of
an express
promise, can-
not be main-

ASSUMPSIT for money paid, laid out, and expended. Plea; non assumpsit. At the trial at the York Spring As-

tained against a husband for money, either lent to the wife to conduct, or actually laid out by a stranger in conducting, at the wife's request, an indictment against the husband, for an assault upon his wife.

sizes, 1835, before *Alderson B.*, it appeared that the plaintiff had advanced money to the wife of the defendant, to enable her to prosecute her husband for an assault, and that he now sought to recover from the husband the money so expended. He had paid several sums for the expenses of witnesses upon the trial of the indictment, and had undertaken to pay the attorney's bill, which amounted to upwards of 100*l.*; but there did not appear to have been any undertaking or promise by the husband to pay this demand. It was proved upon the trial of the indictment, that the husband had been guilty of gross misconduct towards his wife, in shutting her up and keeping her imprisoned in his own house, for a year and a half, and that she was liberated only by the active interference of her friends. A verdict of guilty passed against the defendant, and he was sentenced to an imprisonment of twelve months, and to the payment of a fine of 50*l.* A verdict was found for the plaintiff for the whole demand, after an objection by the counsel for the defendant that the action was not maintainable; and the learned judge gave leave to move to set that verdict aside, and enter a nonsuit. In Easter term, 1835, *Alexander* accordingly obtained a rule nisi to enter a nonsuit, on the ground taken at the trial.

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Cresswell now shewed cause. The prosecution was necessary for the protection and safety of the wife; and the husband is, therefore, liable for the expenses incurred for that purpose. That the assault was no venial offence, may well be inferred from the nature of the sentence, and it was absolutely necessary that such a husband should be taught that his ill-treatment of his wife would not go unpunished by the law. In *Shepherd v. Mackoul* (a) it was held that the husband was liable to pay the bill of an attorney, who assisted the wife to exhibit articles of the peace against her husband, because they were necessary for her preserva-

(a) 3 Camp. 326.

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tion and safety. The indictment, in the present case, was preferred to prevent the husband from ill-treating his wife. The preferring the indictment is only resorting to another mode of protecting the wife. The fear of punishment was more likely to affect his mind than the mere forfeiture of his recognizance to keep the peace. [Coleridge J.—In *Shepherd v. Mackoul*, the plaintiff was the attorney.] The only question is, whether the indictment here was necessary for the wife's protection. If it was, the Court cannot possibly order a nonsuit to be entered, but must give the plaintiff judgment for the money thus necessarily expended for the wife's protection. In *Williams v. Fowler* (a) it was held, that a husband was liable for the costs of proceedings, both in law and equity, which had been considered necessary to be instituted on behalf of his wife. [Coleridge J. In that case there was evidence of an undertaking by the husband.] There was some evidence, but the case did not proceed on that ground. *Harris v. Lee* (b) shews that, although money lent to the wife for necessaries could not be recovered from the husband, as the wife might expend the money in other ways; yet if it is so applied, the lender can recover the money, as standing in the place of the person who supplied the necessaries; if a married woman was ill-treated by her husband, and was compelled to hire lodgings, and buy clothes and food, and a third person caused these things to be provided for her, on his credit, and then paid for them, there can be no doubt that he could maintain an action against the husband for the amount. That was exactly the situation in which the plaintiff stands in the present action, with the single difference, that the money had been applied to secure legal protection for the wife, instead of procuring her food and clothing.

Alexander contra, was not called upon by the Court.

(a) 1 M'Clelland & Young, 369.

(b) 1 Peere Wms. 483.

LORD DENMAN C.J.—We are all satisfied that the present action is not sustainable. The rule for a nonsuit must be made absolute. It is impossible to say that the prosecution of a husband by his wife, could be necessary for her protection. There is another mode of protecting herself. She might have exhibited articles of the peace against him, and if that had been a measure necessary for her protection, the attorney employed by the wife might have recovered from the husband, the expense inturred on that account; *Shepherd v. Mackoul*(a) is certainly an authority for that. In *Williams v. Fowler*(b) there was an express agreement on the part of the husband to pay the costs, if they were found reasonable. In *Harris v. Lee*(c) the question was, whether the trustees, appointed under a husband's will, to sell his lands and pay his debts, could be called upon to pay the money advanced by a third person, for the purpose of curing the wife of illness, occasioned by the husband's misconduct. The Lord Chancellor thought that that might be done, considering that the money had been actually expended in procuring necessaries for the wife. If the indictment by the wife in this case against the husband cannot be considered as necessary, there can be no reason, in the absence of an express promise by him, for calling on the husband to pay the costs in preferring it.

PATTESON J.—All the cases referred to were those in which the articles supplied were clearly necessaries for the wife. Is it possible to say that this is the case with regard to an indictment preferred by the wife against the husband? Was it necessary as a protection for the wife? I cannot see how it can be so considered.

WILLIAMS J.—As the indictment was not necessary for the protection of the wife, I think there is no ground

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(a) 3 Camp. 326.

(c) 1 Peere Wms. 483.

(b) 1 M'Clelland & Young, 269.

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for implying an undertaking to pay on the part of the husband.

COLERIDGE J. concurred.

Rule absolute.

Friday,
Nov. 18th.

MANNING v. WASDALE.

1. A right in the occupier of an ancient messuage to water his cattle at a pond, and to take the water thereof for domestic purposes, for the more convenient use of his messuage, is an easement and not a profit *a prendre* in the soil of another.

2. *Semble*, if such a right were a profit *a prendre*, that the allegation that the water was to be for the more convenient use of the messuage, is a sufficient limitation of the right claimed, on general demurrer.

3. *Semble* also, that such a right may be claimed by custom.

CASE for disturbance of the plaintiff's right to water his cattle at a pond, and to take water for the use of his messuage. The declaration stated, that the plaintiff was an inhabitant residing and inhabiting within the parish of St. Ive's, in the county of Huntingdon, to wit, in and upon a certain ancient messuage, with the appurtenances, there situate; and being the occupier thereof, and by reason thereof of right was entitled to the use and easement of *washing and watering his cattle in a certain pond in the parish aforesaid, called "Jarwood, otherwise Darrod's Pond," and also of taking and using the water of the said pond for culinary and other domestic purposes*, for the more convenient use and enjoyment of the said messuage, every year and at all times of the year, at his free will and pleasure. Yet the defendant, whilst &c., wrongfully encroached upon and filled up, lessened and obstructed the said pond, to wit, by throwing therein large quantities of bricks, stones, earth, rubbish, mortar, and other materials, and thereby greatly diminished the water of the said pond, and continued and left the same pond so filled up, lessened, and obstructed, and the water thereof so diminished for a long space of time, and thereby also rendered the plaintiff's access to the said pond, for the enjoyment of his privilege and easement aforesaid, less convenient and easy; whereby the plaintiff during, &c., was and is greatly injured and disturbed in the use and enjoyment of his said right, privilege, and easement. The second count stated, that the plaintiff was an inhabitant residing and inhabiting within the parish and county aforesaid, to wit, in and upon, and occupying

a certain other messuage, with the appurtenances, there situate, and by reason thereof, during all the time aforesaid, *of right was entitled to the use and benefit, privilege, and easement of washing and watering his cattle in the said pond, and of taking and using the water thereof for his domestic and other purposes, at all times of the year, at his free will and pleasure.* It then complained, that the defendant had built upon the pond. There were several pleas to this declaration, on some of which issue was taken, and the cause went down for trial, when a verdict passed for the defendant. The following plea was pleaded to the first count.

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Declaration.

And for a further plea, &c., the defendant says, that Plea.
the plaintiff has not, nor have the owners or occupiers of the said messuage for the time being, in the said first count mentioned, at any time within twenty years next before the committing of the grievance in the said first count mentioned, used, exercised, or enjoyed the said use, benefit, privilege, and easements in the said first count mentioned. This plea concluded with a verification. A similar plea was pleaded to the second count. To these pleas there was a special demurrer, setting out for causes Demurrer.
that they are respectively exclusively founded upon an alleged non-user of the easements and privileges mentioned in the declaration, for twenty years next before the commencement of this action, which, as such non-user alone for twenty years, is wholly insufficient in itself to destroy, extinguish, or defeat the rights and easements respectively mentioned, prescribed for, and laid claim to in said declaration; and for that those pleas respectively allege mere matter of evidence, which at most would only found a presumption in law of a release, or other conveyance or abandonment, of the right claimed by the declaration; and defendant, if he means to rely on lapse of time as evidence of a release, destruction, or extinguishment of plaintiff's right to the easements and privileges claimed in the declaration, ought to have distinctly pleaded and averred the legal effect of such evidence. And for that, neither of the said pleas

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respectively alleges, nor doth it by either of them appear, that plaintiff hath at any time submitted to, or acquiesced in any interruption to, or disturbance of, his said rights and privileges mentioned and set forth in the declaration; nor in fact that there ever has been at any time any interruption to the right or title of plaintiff to the several privileges and easements in the declaration mentioned, nor do the pleas, or either of them, in any manner deny that plaintiff has continually asserted and maintained his right, during the whole period of said twenty years in the pleas respectively mentioned, to the said privileges and easements in the declaration mentioned. And for that it is perfectly consistent with every allegation in said pleas respectively, that the rights and easements claimed by the declaration continue altogether undisturbed and unaltered. And for that, second and seventh pleas respectively are argumentative, inconclusive, and in other respects bad in law. Joinder in demurrer.

Kelly appeared in support of the demurrer, but the Court called upon *Wightman* to support the pleas.

Wightman.—The right claimed by the declaration is divisible into a right to take water for the plaintiff's cattle, and a right to take water for culinary purposes, and the claim is made in respect of the plaintiff's ancient messuage. But the claim is much too large, for it is, in effect, for any number of cattle, and is not restricted to cattle levant and couchant, as it ought to be; *Mellor v. Sputeman* (a). It has been laid down, "that prescription to have common for all his cattle commonable is not good, for thereby he may put in as many beasts as he will" (b). And the reason is obvious, the right claimed to take water or to have common is a profit *a prendre in alieno solo*, and if that should be unlimited, it would tend to the destruction of the inheritance. A right to a profit *a prendre* being founded on a supposed grant from the lord of the soil, who never can be supposed to have

First point.
The claim to
water cattle
not restricted
to cattle levant
and couchant.

(a) 1 Wms. Saund. 342.

(b) March, 83; Cas. 137.

made such a grant as would defeat all concurrent rights, and destroy the very matter in which a right was granted. It is clear, therefore, no such unlimited right can exist (a). The right claimed should have been to take water for all cattle levant and couchant, on the ancient tenement, which might have been upheld. [Coleridge J. Have you any authority for stating that the right to take water for cattle is a profit *a prendre*, or any thing more than an easement? The late act 2 & 3 Will. 4, c. 71, s. 1, says, "that no claim to a right of common or other profit from land shall be defeated, by shewing that it was first enjoyed at any time prior to thirty years; and the next section relates to easements, or to any watercourse, or to the use of any water, and clearly does not contemplate the use of water to be such a profit of the soil as your argument supposes.] That may be so in the case of running waters *publici juris*, but it does not apply to private ponds; and *Gateward's* case (b) seems to show that the water being on the soil and of value, is a profit of the soil, as much as the herbage growing upon it. *Wilson v. Willes* (c) is an authority that, when a claim like the present is made in such general and indefinite terms, it cannot be supported. That last case is also an authority for the second point, that the declaration is defective in not stating that the water taken for culinary purposes was to be expended in and upon the ancient messuage. In the analogous case of a right to take turves, it must always be alleged that the turves were to be used and spent upon the ancient messuage. All the precedents contain these words (d), and the cases shew that the allegation is necessary. *Valentine v. Penny* (e), *Dean and Chapter of Ely v. Warren* (f), *Wilson v. Willes* (c). [Patteson J. The declaration says the plaintiff was entitled to the privilege of taking and using the

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Second point.
 The claim to take water for culinary purposes, not restricted to the use of it in and upon the messuage.

(a) See *Smith v. Gatewood*, Cro. id. index xxx. li. 2 Chit. Pl. 573, Jac. 152; *Fowler v. Sanders*, Cro. 6th ed. See also *Hayward v. Cunningham*, 1 Lev. 231.

(b) 6 Rep. 59 b.

(c) Noy, 145.

(c) 7 East, 121.

(f) 2 Atk. 189. See also *Tyringham's case*, 4 Rep. 37.

(d) See 3 Wentw. 513, 597, and

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water of the said pond for culinary and other domestic purposes, for the more convenient use and enjoyment of the said messuage. The question, therefore, is, whether that is not an imperfect allegation that the water was taken to be spent in and upon the messuage, which has been cured by pleading over. In *Corbyson v. Pearson* (a) the very point arose, where the plaintiff in trespass for impounding his cattle, prescribed for right of common for his cattle levant and couchant, and omitted to aver that the cattle taken were levant and couchant; but the Court held, that the defect was cured by the statute of jeofails.] That was after verdict, here every objection is open to defendant that may be taken on general demurrer. On this allegation in the declaration the plaintiff might have proved the issue, by showing a user of the water any where else away from the messuage, or he might have sold the water, both of which users are quite inconsistent with the principle of a *profit a prendre*.

Kelly contrà.—An action cannot be brought to recover the possession of water; it must be described as so much land covered with water, which shows that it is not a profit *a prendre*. The distinction between an easement and a profit *a prendre*, was clearly taken in *Fitch v. Rawling* (b), and a right like the present was admitted, both there and in *Blewett v. Tregonning* (c), to be a mere easement. The objection that water should be claimed to be taken from a pond in limited quantities only, as otherwise the pond might be exhausted, would apply with equal force to a well or spring, which has been held to be an easement (d). Rights of this kind to take water at a pond as an easement, frequently come before juries, as in *Moss v. Johnson*, tried at Cambridge (e). The other objection could only be taken on special de-

(a) Cro. Eliz. 458.

(b) 2 H. Bl. 393.

(c) 5 N. & M. 234—308; S. C. 3 Ad. & El. 554.

(d) 15 Ed. 4, 29. *Boteler v. Bristow*, "Genney ceo nd este admitte bon prescription a dire que

touts les inhabitants deins un tiel ville ont use de temps, &c., d'aver ewe en un tiel fount pur faire manger et boyer et tous necessaries."

(e) Reported on other points as *Cross v. Johnson*, 4 M. & R. 290; S. C. 9 B. & C. 613.

murrer, but the allegation is not even demurrable specially, as no use could be made of the water elsewhere than at the house, for the more convenient use and enjoyment of the messuage. A reasonable construction must always be applied to cases of this kind.

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Wightman in reply. *Blewett v. Tregonning (a)* is an authority to shew that the right claimed here is a profit *a prendre*, for it decided that a custom to take drifted sand was such a profit, because it tended to exhaust the whole close; so a right to take water in unlimited quantity may have the same effect, and falls entirely within the same principle.

LORD DENMAN C. J.—It seems not very consistent with the ordinary use of language to say that the right to take water from a pond is a profit *a prendre*. Some produce of the soil is naturally looked to as the subject-matter of that term. But supposing the right claimed to be a profit *a prendre*, I do not see that it is not very properly laid in the declaration; for, limited as the right is to take water for certain culinary and other domestic purposes, there is nothing from which the Court can infer that there is not such a constant supply of water to the pond, as to allow the plaintiff to take such quantities from it without any fear of diminution.

PATTERSON J.—I am of opinion that the objections made to the declaration cannot be taken on general demurrer. The inclination of my mind is, that this is not a profit *a prendre*; and if it were, I doubt whether, on general demurrer, the question could be raised. The right claimed in the declaration is to take water ‘for the more convenient use and enjoyment of the said messuage;’ that is not, strictly speaking, an averment that the water shall be used in and upon the said messuage only; but still, on general

(a) 5 N. & M. 234—308; 3 Ad. & Ell. 554.

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demurrer, the allegation would be sufficient, being cured by the statute of jeofails, 27 *Eliz.* c. 5. And although it was said, in answer to the case I cited (a), that the objection there was cured because it was after verdict, that makes no difference, because the statute remedying certain defects after verdict was not passed till the 21 *Jac.* 1, c. 13. [*Wightman* suggested, that if the judgment of the Court proceeded upon the ground of the words "for the more convenient use and enjoyment of the said messuage," being a sufficient allegation on general demurrer, there should be judgment for the defendant on the second count, in which these words were omitted.] The question then arises, whether this is a profit *a prendre* or not, and I am not at all unwilling to decide the case upon that ground, as it seems to me the taking out water from a pond is not a profit *a prendre*; which must be something arising out of the soil, which is not the case here. There is one instance which occurred to me during the argument, in which there would be a right of this sort, which really might exist in the inhabitants of a parish by law. In inclosure acts, the commissioners are ordered, not unfrequently, to set out a pond for the use of all the inhabitants as a watering place; and in such case I am not at all prepared to say that the plaintiff might not, in a declaration against a stranger for filling up that pond, have claimed the right in the manner here stated. And if there be any possible mode in which such a claim can be supported, we are bound on general demurrer to give it effect.

WILLIAMS J.—It seems to me on the first count, that, on Mr. *Wightman*'s own objection, there is a sufficient and intelligible restriction in the use and application of the water to be taken from the pond; because, for the convenient use and occupation of the messuage and dwelling, in respect of which it is claimed, seems to me, on general demurrer, to be a sufficient restriction of the application of that water within a reasonable, because a limited purpose.

(a) *Corbyson v. Pearson*, Cro. Eliz. 458.

Upon the second count, for the reasons given, we are not driven to consider this by the rule applicable to the cases of profits *a prendre*. I do not think sufficient appears on this record, or that the right claimed is of a nature to make it fall within that class of cases.

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COLERIDGE J.—My judgment certainly proceeds on a ground that makes it immaterial to consider the distinction between the two counts. I do not think the right here claimed, is a right to take a profit from the soil of another person. It appears to me this is a right that might have been claimed by custom, although it is not so claimed here, and that it is a mere easement, and does not fall within the principle of those cases that have been cited.

Judgment for the plaintiff.

REX v. The Inhabitants of MILVERTON.

Saturday,
 Nov. 19th.

INDICTMENT for the non-repair of a common highway in the parish of Milverton. The road out of repair was called Blackgrove's Lane, one part of which was wholly in the parish of Milverton, the remaining part was half in the parish of Milverton and half in the parish of Oak. The indictment containing three counts, of which the first was applicable to that part of the road in Milverton only, was found at the Easter sessions for the county of Somerset, 1835, and removed by certiorari into the Court of King's Bench; and at the trial at the summer assizes for that county, in 1835, a special verdict was taken, setting out, among other facts, an order made at a special sessions, held at Milverton, 1818, by two justices of the peace for the county of Somerset, acting within the hundred of Williton, in which, after reciting that it appeared to them, on view, that a highway in the parish of Milverton, called Cook's Lane, was

1. An order of justices under 55 Geo. 3, c. 68, stopping up more than one highway, is void.
2. Such an order, stopping up *part* only of a highway, is void.
3. Justices have no authority to narrow a highway.
4. *Seemle*, justices have no power to stop up a road out of the division or hundred for which they act.

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useless and unnecessary; and that another highway, called Blackgrove's Lane, was useless and unnecessary, the entirety of which last highway, to a certain point mentioned in the order, was in the parish of Milverton, and the southern side thereof from the said parish was also in Milverton, and the northern side thereof was in the parish of Oak, in the same county; and that another highway, specified in the plan annexed, (part of which was in the parish of Milverton, and the other part in the parish of Fitzhead,) was also useless and unnecessary, proceeded to state, "we do hereby order that this public highway, hereinbefore first described and stated to be useless and unnecessary, and also the said public highway hereinbefore secondly described and stated to be useless and unnecessary, (except so much and such part thereof as is in the parish of Oak, in the county aforesaid,) and likewise the said public highway hereinbefore thirdly described and stated, &c. (except so much and such part thereof as is in the parish of Fitzhead,) be stopped up." It was also found by the special verdict, that the three highways, directed to be stopped up by the order, were altogether distinct and separate highways, and at considerable distances from each other, and that no order had been made by any justices of the peace for stopping up such part of the highway called Blackgrove's Lane, as was stated to be in the parish of Oak; that Blackgrove's Lane had never been divided or allotted under the provisions of 34 Geo. 3, c. 64; and that the special sessions at which the order was made for stopping up roads, &c. in Oak, was held at Taunton, and not at Milverton, and the parish of Oak is not within the division for which the justices who made the order acted as trustees in 1818.

First point:
 Order invalid
 for stopping
 up more than
 one highway.

F. N. Rogers, for the crown (*a*). The road indicted is part of Blackgrove's Lane, which is the second highway mentioned in the order. The power to stop up unnecessary high-

(*a*) Several points were made by the prosecutor, as objections to the order of the justices, but as the decision of the Court turned upon the two first only, the argument on the others has been omitted.

ways is given to justices by 55 Geo. 3, c. 68, s. 2, but the mode of stopping up is to be according to the provisions of 13 Geo. 3, c. 78, s. 19, and the schedule attached to that act. This Court requires strict observance of those provisions, as was exemplified by their decision this term in *Rex v. The Justices of Middlesex (a)*. The form No. xvii, given in the schedule to 13 Geo. 3, c. 78, for stopping up a highway, has a marginal note, directing that if there be more than one highway to be stopped up, there should be a separate order for each, and this marginal note is part of the statute, being found in the parliamentary roll. As it has been held that the words of the act are peremptory, that the "forms of proceedings set forth in the schedule annexed, shall be used on all occasions," *Davison v. Gill (b)*; it follows that an order stopping up three highways is invalid. The opinion of the profession corroborates this conclusion, and has been laid down by Mr. Chitty, and Mr. Wellbeloved, in their treatises, and it is confirmed by the enactment in the recent Highway Act (c), which authorizes justices to stop up more highways than one, when they are connected together, in one order, clearly shewing that no such power existed before. The object of the 55 Geo. 3, c. 68, was to give more public notice of orders for stopping up roads, and greater facility of appeal to parties aggrieved; but as parties appealing have to give notice in writing to the surveyor of highways of the parish wherein the road stopped up is situated, and to affix a similar notice on the church door of the parish, if eight or ten roads in different parishes might be stopped up by one order, so many different notices would have to be given, that the power of appeal would be quite defeated.

The order finds that part of the highway called Blackgrove's Lane, is in the parish of Oak, and after having found, on view of the justices, that the highway is useless and unnecessary, it proceeds to direct that the highway (except so much as is in the parish of Oak) shall be stopped up. But justices have no power to stop up half a road.

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Second point:
 Justices have
 no power to
 stop up part
 of a road.

(a) *Ante*, 1 N. & Perry, 92.

(c) 5 & 6 Will. 4, c. 50, s. 86.

(b) 1 East, 64.

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The magistrates in each division ought to have viewed the road in their respective jurisdiction, and then the two sets of magistrates might have stopped up the whole road; or the magistrates who made the order might have stopped up the whole road. For Lord *Holt* said, "the words of an act of parliament, that justices of peace of such a division shall do so and so, are only directory, quoad the division, and any of the justices of the county may do it" (a). The authority given by the statute must be strictly pursued, and if the words of the statute, which authorize the justices to stop up any highway, bridleway or footway, do not include a way in two divisions of a county, it is a *casus omissus*, which must be rectified by the legislature. A stoppage of this kind would be a great hardship to the public, who would not know whether they might use such a road or not. The parish of Oak also would still be bound to repair that part of the road within their limits.

First point.

Bere, (and *Carrow* was with him,) contra. If the order of justices is invalid because it comprehends more than one highway, it can only be by statutory provision, for there is no common law authority to say that it is bad. An indictment may charge several persons, who are exposed to the inconvenience of making separate defences, it may even include two separate offences, such as murder and burglary, which might be ground for the discretion of the Court to quash the indictment, but would not be a good objection in arrest of judgment. So an order of magistrates is good for the removal of a mother and her illegitimate child; and it has been held, that when an order contains two different adjudications, it may be good for part, though bad for the remainder; *Rex v. Inhabitants of Maulden* (b). The magistrates therefore were authorized at common law to make an order including more than one highway, and no statute has taken away that authority, for the words in the schedule

(a) 19 Vin. Abr. tit. Statutes,
(E. 6, 56,) page 516.

(b) 4 M. & R. 146; S. C. 8 B. &
C. 78.

of 13 *Geo. 3*, either do not apply or they are directory only. It is admitted that the marginal note to form xviii. in the schedule, is in the parliamentary roll, where it appears to have crept in by accident; but at the time that statute passed, the magistrates had no power to stop up an unnecessary highway, it is therefore very unlikely that the legislature should have intended that the form given in that statute, for stopping up a different sort of way, should be pursued. It is true sect. 22 of 13 *Geo. 3*, gives the magistrates power to stop an unnecessary highway, but that is only in the case where any highway has been diverted previously in the parish; and therefore, although the form xviii. in the schedule, might suit such a case, it is impossible to mould it to an order like the present, where no previous proceedings are contemplated. The words in the 55 *Geo. 3*, c. 68, directing the proceedings under that act "to be by such ways and means, and subject to such exceptions and conditions," as are mentioned in 13 *Geo. 3*, do not mention "forms" at all, and the "ways and means" probably apply only to the mode of "selling and disposing of the ground and soil," with which they are joined in the sentence. But if the schedule and the marginal note of 13 *Geo. 3*, are applicable to the proceedings under 55 *Geo. 3*, the words are directory only, as appears from *Rex v. Casson* (a), and there are several authorities to shew that in such cases the non-observance of such direction would only make the order voidable, not void. *Gray v. Cookson* (b), on the statute 5 *Eliz. c. 4*, s. 26, where the words of the act are much stronger; *De Ponthieu v. Pennyfeather* (c), on this very statute; *Rex v. Stotfold* (d).

Hennah v. Whyman (e), is similar in principle, where the objection was, that the indorsement on a writ of summons was not according to the form of indorsement specified in the schedule of the act (f). But *Parke B.* said, "the act says nothing about the indorsement, and the form of the indorse-

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(a) 3 Dowl. & Ry. 36.

(b) 16 East, 13.

(c) 5 Taunt. 634.

(d) 4 T. R. 596.

(e) 2 C. M. & R. 239.

(f) 2 Will. 4, c. 39, form 4.

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Second point.

ment given in the schedule is nothing but an example." The order being voidable only, the objection should have been taken at the sessions on appeal against the order.

The magistrates have confined themselves in the order to that part of the road within their jurisdiction, as it appears by the verdict that Oak was not in their division. Suppose the road in question were within two counties, the magistrates in each could only act with regard to the road in their own county; but if they find such a road useless and unnecessary, it is clear that they may stop it up, and it would follow as a necessary consequence, that if they find one-half of a road to be useless, the other half must be so also. If the other half of the road were not useless, that would be indeed a good ground of appeal against the order, but it is a question of fact, and not of law. A road in different divisions is similar to one in different counties; by form xvi. in the schedule to 13 *Geo.* 3, it would appear that only magistrates acting within the hundred &c. are authorized to act; and by sect. 62, the special sessions for stopping up roads is to be held by summons from the high constable to the justices, within their respective limits. And the practice has always been for magistrates only, at special sessions, acting within their limits, to stop up roads (*a*). But supposing the magistrates to have a right to stop up the whole road, both in their division and out of it, it follows that they must have a right to stop up a part; and the only objection to stopping up a part would be, that it might render the other part of the road useless; but that is an objection which might and ought to be taken at the sessions, and at the sessions only. If this is not so, a road like the present could not be stopped up at all, which would be a very great hardship to parishes burdened with their repairs.

Lord DENMAN C. J.—We are quite clear upon this latter point, that where an order is made for stopping up a road, the whole must be stopped up, or none. If a road runs

(*a*) See *Rez v. Justices of Worcestershire*, 2 B. & Ald. 228.

into different counties, or divisions of a county, then the justices in each jurisdiction should confer together, as to the use and necessity of that particular road, and if they concur that it is useless and unnecessary, then they may make an order to stop it up; but without such concurrence, it does not lie in the power of either set of justices to stop up half the road.

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PATTESON J.—I am of the same opinion. It is quite impossible to look at 55 Geo. 3, without seeing that this order is invalid. That act authorizes justices to stop up unnecessary roads. But this order really does not stop up the road; all it does is to narrow it. Now there is no power given to justices to narrow a road, although there is to widen, by 13 Geo. 3, c. 78, s. 16.

WILLIAMS J. concurred.

COLERIDGE J.—Until this act passed, magistrates had no power to stop up unnecessary roads, it is therefore no argument to say, that unless it is allowed to be done under this act, it cannot be done at all. In many cases it may be fit to stop up a whole road, when stopping up part of it would be improper, for if part only be stopped up, parishes would still be liable to repair that part, and yet have no benefit from the whole road.

Judgment for the crown.

Bere afterwards suggested to the Court, that the grounds of the judgment did not apply to that part of the road which was wholly within the parish of Milverton, and which was stopped up by the second part of the order, and was the subject of the first count in the indictment.

Lord DENMAN C. J., on the last day of term, delivered the judgment of the Court.—One among the numerous points, on which we gave judgment for the crown, being applicable to one only of the roads indicted, we have had

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to consider the other of them, which was argued before us on both sides.

The prosecutor contended that the order for stopping up the road in question was invalid, because it stopped up also two other roads, perfectly distinct from it, and we are of opinion that this objection must prevail.

The power of stopping roads is vested in the justices of the peace, by the 55 *Geo. 3*, s. 2, a power unknown to the common law, and requiring to be exercised in strict conformity to the statute which creates it. The clause enacts, that "it shall and may be lawful" to stop roads by such ways and means, in all respects, as are prescribed by the 13 *Geo. 3*, for widening or diverting highways; these are to be found in the 16th section, in numbers 16, 17, and 18, of the schedule annexed to the latter act, and the form of the order for stopping up (which is No. 18) clearly contemplates one highway only.

There is a marginal note to this form, which is not merely found in the printed act, but on the parliament roll. "If there are more highways than one to be stopped up, there should be a separate order for each." These words are a part of the act of parliament, and must receive their full effect. Even if they were of less weight, the language of the 55 *Geo. 3*, constantly referring to one order, one notice, one highway, would appear to the Court sufficient to limit the operation of any order to a single road. This is required both for convenience and fair dealing; it is also the proper construction of a statute which creates a new power, and expressly defines the manner in which it must be exercised.

Such was the view taken by Lord *Kenyon*, in *Davison v. Gill*(a), and by Lord *Tenterden*, in *Rex v. Justices of the Peace for Kent*(b), to which, on a late occasion, we felt ourselves bound to adhere.

A simple rule is thus laid down for the guidance of magistrates and the protection of the King's subjects; the

(a) 1 East, 64.

(b) 10 B. & C. 477.

former will not be perplexed with small distinctions, nor the latter deprived of their rights without full and clear notice.

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Judgment for the Crown.

The KING v. MARSH.

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THE defendant was indicted at the general sessions, held in February last, for the town and port of Dover, for soliciting one *Joseph Moore* to personate one *John Moore* at an election for councillors of the Pier ward of Dover. This indictment was removed into the Court of King's Bench by certiorari, obtained at the instance of the defendant. The indictment was tried at the Kent summer assizes in 1836, before Lord Abinger C. B. and the defendant was found guilty. In this term Sir *J. Campbell* A. G. applied for a rule nisi to quash the indictment upon several affidavits, one of which was made by the foreman of the grand jury, and stated that the grand jury consisted of 28 persons, and that 25 having sat in consideration upon the bill; 12 voted for the finding of the bill, and 13 against it. That the jurymen had asked the recorder (a) what number of grand jurymen was necessary for the finding a bill, and he told them that 12 must concur in the finding, upon which they brought in the bill, although a majority of those who took it into consideration, voted against it. The affidavit of another person, who was not a jurymen, stated that 28 persons were sworn upon the grand jury. The town clerk stated, that he was unable to say, from a reference to the minutes of the sessions, how many persons were sworn on the grand jury, there being no mark to

1. A grand jury ought not to consist of more than 23 persons.

2. Where more than 23 persons are sworn upon a grand jury, and a bill of indictment is found by them to which a defendant pleads, and is tried and found guilty: The Court of King's Bench will not upon motion quash the indictment.

3. If more than 23 are sworn upon the grand jury, the defendant in an indictment found by them, may, if that fact appears upon the caption of the indictment, bring error in law. If it does not appear there, then he may bring error in fact.

(a) It was stated to the Court, by the Attorney-General, that the Recorder did not know that more than 23 were sworn on the grand jury.

4. The Court of King's Bench will not receive an affidavit of a grand juror as to what passed in the grand jury room, upon the subject of a bill of indictment.

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distinguish those who were sworn from those who were not; that the officer who summoned the jury returned the names of 31 persons, and that he swore in as grand jurymen all of the number returned, who presented themselves at the opening of the sessions; that, to the best of his recollection, he swore in on such grand jury a greater number than 23 persons, and that he was induced to swear in all who presented themselves, in order to avoid any imputation that he made a selection for political reasons, as he was aware that a bill of indictment would be preferred against the defendant, about which a great deal of excitement prevailed. It appeared also by an affidavit made by the person who summoned the grand jury, that more than 23 were sworn. The following authorities were cited by the Attorney-General in support of the motion, *Sykes v. Dunbar* (a), note by Mr. Christian to the 4th vol. of *Blackstone's Commentaries* (b), *Archbold's Criminal Law* (c), *Hawkins's Pleas of the Crown* (d), and the entry made by Sir J. Burrows, master of the crown office, in 1760, with the observations of Lord Mansfield C. J. (e). It was observed by Lord Denman C. J. in the course of the argument, that both the oath taken by each grand juror

(a) 2 Selwyn's N. P. 1086. 7th ed.

(b) P. 303.

(c) 4th ed. p. 58.

(d) Vol. 2, p. 651.

(e) "This being grand jury day, it was intended by the sheriff and pressed by the two knights of the shire for Middlesex, that all the principal gentlemen of the county (not fewer than *fourscore* in number) should be sworn of this grand jury, in order to their being included in an address to his majesty from and in the name of the grand jury of Middlesex, upon his accession to the crown. But upon the sheriff's mention of this to me it seemed to me to be irregular and improper to swear

more than 23. Because if a number amounting to two full juries or more should be sworn it might happen that a complete jury of twelve might find a bill to be a true one, though other twelve, or even more than twelve, of the very same jury, might reject it as an untrue one, which would be inconvenient, as well as contradictory, and even somewhat absurd and ridiculous."

Lord Mansfield, upon being apprised of this, said "It would be monstrous to swear *fourscore*, and that the officer could not properly swear more than three and twenty." 2 Burr. 1088.

and public policy, prohibited what occurred in the grand jury room from being made public. The Court granted a rule nisi, on the ground that in swearing more than 23 persons on the grand jury, the usual course of public justice had been departed from; and it was said by the Court, that they could not take into consideration what occurred in the grand jury room. That part of the affidavits which stated what occurred in the grand jury room, having been struck out, the rule was drawn up.

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Platt and Adolphus now shewed cause against the rule. As the grand jury consisted of 28, and 25 voted, it is to be intended that 28 found the bill. The earliest authorities shew that an indictment found by 12 men was sufficient. A majority was not required except in cases where the grand jury consisted of 23, and then, of course 12 formed a majority. In *Coke upon Littleton* (a), an indictment is defined to be in law an accusation found by 12 or more upon their oaths. It may be found by more than 12 men, but if found by 12 it is sufficient. In *Hale's Pleas of the Crown*, the nature of the summons in virtue of which the jury were to attend, is stated, and it is there (b) said, that the sheriff is to summon 24. In the same book (c), it is said if there be 13 or more of the grand jury, a presentment by less than 12 cannot be made, but if 12 assent to it, it is sufficient. The circumstance that in general only 25 are sworn, is merely the result of convenience. In *Comyns's Digest* (d) an indictment is defined to be "an accusation or declaration at the suit of the king, for some offence found by a proper jury of 12 men." In *Hawkins's Pleas of the Crown* (e) it is said "an indictment is an accusation at the suit of the king by the oaths of 12 men of the same county wherein the offence was committed, returned to inquire of all offences in general in the county, determinable by the Court into which they are returned, and

(a) Co. Lit. 126 b.

Just. 400.

(b) 2 Hale, P. C. 154.

(d) Com. Dig. Indictment (A).

(c) Ibid. 161, citing Lamb.

(e) 2 Hawk. P. C. 399, 6th ed.

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finding a bill brought before them to be true." It is defined in the same manner by Mr. Justice *Blackstone*, in his *Commentaries* (a). It is there said, "To find a bill there must at least 12 of the jury agree;" and *Viner*, in his *Abridgment* (b) adopts the authority of *Hawkins*. It plainly appears from all these authorities, that in order to put a man upon his trial it is sufficient that the bill should be found by 12 men. But there is another objection to this application,—it is too late, the defendant has been tried and convicted—he has declared his innocence, he has put himself upon his country to have that question of his guilt or innocence decided, and the verdict of the jury has been against him. There has therefore been a finding of 12 of the grand jury and a verdict of 12 of the petty jury against him, and he has been thus convicted upon the oaths of 24 men. The substance of the motion now made should have been brought before the Court where the indictment was found, by a plea in abatement, but after a conviction, this Court cannot give the defendant the benefit of a plea in abatement upon a motion of this sort. Such a plea would have brought the question of the jurisdiction of the Court fairly under consideration, but the defendant having once submitted to the jurisdiction, cannot now dispute it. Suppose this Court give judgment that the indictment be quashed, the record will then present this appearance,—the finding of the indictment, the arraignment, the plea, the issue, and the verdict of guilty, will all be regularly entered, and then it will appear, notwithstanding this, that the Court ordered the indictment to be quashed. [*Coleridge J.* Will it not form a part of the record that the indictment was found upon the oath of 12 men?] It is apprehended that it will not. [*Coleridge J.* In the Appendix to the fourth volume of *Blackstone's Commentaries*, there is the form of a record of an indictment and conviction of murder at the assizes, and there the names of the grand jurors are mentioned. Lord Denman C. J. The practice in the crown office is not to mention the grand jurors by name, but that the

(a) 4 Black. Com. 302, 18th ed.

(b) Indictment, (H 9) 5.

indictment is found by the oath of 12 good and lawful men. The caption in this case will be made up at the crown office.] The error in that case will be apparent on the record. With respect to the passage from *Burrows' Reports* (a), it is not there laid down that the grand jury must not consist of more than 23, but that that is the most convenient number. In illustration of the argument *Dr. Sheridan's case* (b) may be referred to; he was indicted under the Irish Convention Act, 33 Geo. 3, c. 29, and it was objected that there were improper persons on the grand jury, but the objection in that case was taken at the trial.

Sir *J. Campbell* A. G. and *Channell*, in support of the rule. This question is to be decided upon a general principle, and not upon any particular inconvenience. It is clear that the bill must be found by a majority of the grand jury, and the number of twelve was merely mentioned by the recorder as the smallest number that could constitute the majority. But that number must be sufficient to constitute a majority, or it was good for nothing. The opposite doctrine is quite untenable, for if any number might be sworn on the grand jury out of 100 sworn, if 12 are sufficient to find a bill, 12 out of the 100 might be in favour of finding the bill and 88 against it, and yet, according to the doctrine now contended for, such a bill would be properly found by a grand jury. No one could gravely venture such an assertion. [Lord *Denman* C. J. The Court does not entertain the least doubt that 23 is the proper and limited number, and that the swearing such a number only is a matter of practice distinctly recognized by authorities in the way in which undisputed propositions are always received. You need not, therefore, argue that point.] If that be so, then this bill was a nullity. *Hawkins* P. C. b. 2, c. 50, s. 3. It was the same as if it had been found by less than 12, or as if the number of the grand jury had not been sworn, or the witnesses before them not sworn, in all which cases it is clear that the

(a) 2 Burr. 1088.

(b) 31 How. State Trials, 543.

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defendant might at any time object to the indictment. In a case from the Northern circuit, where after trial it appeared that the witnesses on whose testimony the grand jury had found the bill, had not been sworn, *Bayley J.*, who had previously passed sentence on the prisoner, reserved the question for the opinion of the 12 judges, who recommended the prisoner to mercy. There it might have been said to the prisoner, you may bring error in fact. If the defendant might, as it seemed to be admitted, bring a writ of error, the Court, on being convinced that the ground for that error really existed, would at once relieve him on motion.

**LORD DENMAN C. J.**—No authority has been cited to shew that we are bound to quash the indictment. Probably the mistake which has occurred will appear in the caption of the indictment. If it does, the defendant may bring error in law. If it does not, he may bring error in fact; there is therefore another mode of proceeding open to him.

**PATTESON J.**—Some express authority should have been shewn to authorize us to quash this indictment, after the defendant has pleaded and gone to trial upon it. Whether the defendant can bring error in fact or in law, will depend upon whether the mistake appears upon the record.

**WILLIAMS J.**—The defendant, who was aware of the mode in which the bill was found, pleads to the indictment and takes his trial. After he is found guilty, he comes to this Court and asks to have the indictment quashed. Under these circumstances we ought not, in my opinion, to interfere.

**COLERIDGE J.** concurred.

Rule discharged (a).

(a) See a report of further proceedings in this case, in Hilary term, 1837, *post*.

The KING v. The Inhabitants of the Parish of  
EASTINGTON.

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Monday,  
Nov. 21st.

**THIS** was an indictment against the parish of Eastington, in the East Riding of the county of York, for the non-repair of a highway.

The indictment stated, that theretofore there had been, and then was, a certain common king's highway, commonly called the Eastington and Sandholme road, leading from Eastington to Sandholme, in the said East Riding, used, &c. ; and that a certain part of the said common or highway situate, &c., on, &c., at the parish of Eastington, was, and yet is, in great decay for want of due reparation, to the great damage and common nuisance, &c. ; and that the inhabitants of the said parish of Eastington, in the riding and county aforesaid, the common highway aforesaid, so as aforesaid being in decay, ought to repair and amend when and as often as it should or shall be necessary.

The plea alleged, that within the parish there now is, and from time whereof the memory of man is not to the contrary there hath been a certain township, called the township of Eastington, wherein there now are and immemorially have been divers inhabitants ; and that the said part of the said highway in the said indictment above specified and thereby alleged to be out of repair, now is, and at the time of the taking of the said inquisition was situate within the township aforesaid, to wit, at the parish aforesaid ; and that the inhabitants of the said township, from time whereof the memory of man is not to the contrary, have repaired and amended, and have been used and

In a plea by a parish to an indictment for the non-repair of a highway, they must shew, not merely that they are not liable, but who is liable to repair it.

A plea to an indictment against a parish, for the non-repair of a highway, alleged that within the parish, from time immemorial, there was a township of E. ; that part of the highway was within the township of E. ; and that the inhabitants of the said township, from time immemorial, ought to have repaired, and still of right ought to repair, all the common highways within the said township, that

would be otherwise repairable by the inhabitants of the parish at large, and that the inhabitants of the parish had not repaired, and ought not to repair, the highway within the township. The plea concluded by stating, that by reason of the premises the inhabitants of the township ought to have repaired the highway, and that the inhabitants of the parish ought not to be charged with the repairing. But it did not state that the road indicted was one which, but for the custom, the parish would be liable to repair. The replication took issue on the custom. At the trial the defendants were found not guilty :—Held, 1st. That the crown was not entitled to judgment *non obstante veredicto*, because it did not appear that the parish was liable. 2nd. That judgment ought to be arrested for want of the above averment.

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accustomed to repair and amend, and during all the time aforesaid ought to have repaired and amended, and still of right ought to repair and amend all the common highways within the said township that would be otherwise repairable by the inhabitants of the said parish at large, and that the inhabitants of the said parish at large have not, during all or any part of the time aforesaid, repaired and amended, and have not been used or accustomed to repair or amend, and of right ought not to repair or amend the king's common highways within the said township or any of them; and that by reason of the premises, the inhabitants of the said township ought to have repaired and amended, and still ought to repair and amend the part of the said highway in the said indictment specified, and thereby alleged to be out of repair, when and so often as it hath been and shall be necessary, *and that the inhabitants of the said parish at large ought not to be charged with the repairing and amending the same*; concluding with a verification and prayer of judgment. The replication traversed the custom.

At the trial before *Alderson B.* at the Yorkshire spring assizes in 1835, the defendants were found not guilty.

In Easter term, 1835, *Starkie* obtained a rule calling on the defendants to shew cause why judgment should not be entered for the crown in this prosecution *non obstante veredicto*, or why judgment should not be arrested, on the ground that the plea did not, after stating the custom for the township of Eastington to repair, go on to allege that the road, but for the custom, would be repairable by the parish at large; and that the parish ought to have shewn by their plea, not only that they were not liable, but also ought to have shewn with certainty who were liable.

First point:  
 Judgment can-  
 not be entered  
*non obstante*  
*veredicto*.

*Cresswell* and *Alexander* (with whom was *R. Hildyard*) now shewed cause. Issue is taken on the custom, which was found for the defendants; that part of the rule therefore which relates to the entering up judgment *non obstante veredicto*, must be discharged, because such judg-

ment cannot be given unless it clearly appears upon the record that the prosecutor ought to have succeeded. In 2 *Wms. Saunders* (a) it is said, a judgment *non obstante veredicto* is always upon the merits, and never granted but in a very clear case. The inhabitants of the parish say, we are not liable to repair this road, but the inhabitants of Eastington are; and the jury have, as far as they legally can, found accordingly. It is impossible, therefore, to say that the crown is entitled to judgment. Then, with respect to that part of the rule which seeks to arrest the judgment, the only objection to the plea is, that it does not aver in direct terms that the parish would be liable but for the custom. In Lord *Ellenborough's* abstract of the plea in *The King v. Ecclesfield* (b), and in the form of plea given in 2 *Wms. Saunders*, 159 c., there is no such averment. It would therefore appear not to be necessary. The conclusion of the plea in *Rex v. Ecclesfield* (b), that the inhabitants of the parish ought not to be charged with the repairing and amending the same, was held to be a sufficient traverse of the liability of the parish; the conclusion of the plea in this case is similar. The omission of the averment is mere matter of form. The plea amounts to this, that the township of Eastington is substituted for the parish, so far as the road is concerned. The road is stated to be within the township. It is therefore in substance stated, that the township, and not the parish, is liable to repair.

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Second point:  
 Judgment  
 ought not to  
 be arrested.

*Starkie* contra. It is not sufficient for a parish indicted for the non-repair of a road, merely to deny its liability to repair, but it must go further, and shew who is liable to repair. *The King v. Yarton* (c), *Rex v. St. Andrew, Holborn* (d), and a series of cases, establish this proposition. Suppose one of several townships divided into three parts, that in the first division the roads were repairable *ratione tenuræ*, in a second division by the division itself, and in a third division by the inhabitants of the township at large,

(a) 319 c. note (c).

(c) 1 Sid. 140; S. C. 1 Keble 498.

(b) 1 B. & Ald. 348.

(d) 1 Mod. 112; S. C. 3 Salk. 183, 8.

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would it be sufficient for the parish to plead that they were not liable to repair, but that the inhabitants of the township were? If so, the parish would succeed, yet the prosecutor would not know against which division to proceed? The presumption is, against a parish, but not for them. [Lord DENMAN C.J. The road is alleged in the indictment to be repairable by the parish at large, must it not therefore be presumed to be a road which would be repairable by the parish at large, if the obligation by the township to repair such roads as, but for the custom, would be repairable by the parish, did not intervene?] The ordinary presumption is one made against the parish, the effect of which is to render the parish liable, until it shall have discharged itself by shewing who in certain is liable. The indictment merely alleges, and must of necessity allege, that the highway is a public highway situate within the parish; this is all that it is necessary for the prosecutor, who may be a stranger, to do; the law requires no more, but casts the liability on the parish until it has discharged itself by shewing to the prosecutor who is compellable to repair the road.

The COURT suggesting the difficulty of supporting the first branch of the bill for entering up judgment for the crown *non obstante veredicto*, it was abandoned.

- First point. Lord DENMAN C. J.—It appears to me to be quite clear, that we cannot grant that branch of the rule which asks for judgment *non obstante veredicto*. With respect to the other branch of the rule, I was very much struck with Mr. *Cresswell's* answer to the argument made on the motion
- Second point. for the rule nisi, but I think the reply now is a good one, namely, the public have a right to demand the repairs from the parish in the first instance. A prosecutor is in ignorance against whom to proceed, and the parish, to get rid of their liability at common law, must shew pointedly and distinctly who are liable, so as to give a clear remedy against some other person. I think that this plea does not do that; and, therefore, the finding on it does not constitute a legal defence.

PATTESON J.—If this had been an action, and not an indictment, the defect pointed out might have been ground only for special demurrer, but it is fatal in an indictment.

COLERIDGE J. concurred (*a*).

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Rule absolute in arrest of judgment.

(*a*) *Williams J.* was absent.

The KING v. The Inhabitants of the Lower Division of  
CUMBERWORTH and CUMBERWORTH-HALF.

Tuesday,  
Nov. 22nd.

THIS was an indictment against the defendants for not repairing a highway leading from the township of Clayton West, in the West Riding of the county of York, towards and unto the township of Denby, in the said West Riding, into, through, and over a certain district, called the Lower Division of Cumberworth and Cumberworth-half, in the several parishes of High Hoyland and Emley, in the said riding. At the trial before *Parke B.*, at the Yorkshire Spring Assizes, 1835, it appeared that the road indicted was part of the main line of a road made under the authority of an act of parliament, (6 *Geo. 4*, c. cxxxviii.) for making and maintaining a turnpike road from Wakefield to join the Shepley-lane-head turnpike road in Denbydale, in the parish of Penistone, with certain branches (*a*). The main line of

The preamble of an act which authorized the making of a main line of road and several branches, recited that the making of the main line and branches would be advantageous to the neighbourhood and the public. The making of all the branches as well as of the main line, is a condition precedent to any portion of the undertaking, as well as the main road as the branches becoming highways; and therefore where one branch remained unmade, al-

(*a*) The preamble of the act was as follows:—Whereas the making and maintaining a turnpike road from a certain street, called Market-street, in the town of Wakefield, in the West Riding of the county of York, through the several townships of Wakefield, Alverthorpe-cum-Thornes, Crigglestone, Horbury Bretton, (otherwise West Bretton), Emley, Clayton West,

Cumberworth, Cumberworth-half, and Denby, or some of them, and within the several parishes of Wakefield, Sandal Magna, Silkstone, Emley, High Hoyland, Kirkburton and Penistone, or some of them, all within the said West Riding of the county of York, to and into and communicating with a certain turnpike road, called the Shepley-lane-head turnpike road,

though the main road was completed, a district liable by prescription to maintain all highways within it, and through which a portion of the main road passed, was held not liable to repair that portion of the main road lying within it, so long as all the branch roads were not completed.



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the road from Wakefield to the Shepley-lane-head turnpike road, and also all the branches described in the preamble, except one leading from a close called Pikeley, to the town of High Hoyland had been completed, but the last mentioned branch was entirely unmade. It was contended at the trial, that the trustees not having made the branch from Pikeley-close to High Hoyland, which by the act of parliament was required to be made, the defendants, who were the inhabitants of the district through which the road indicted passed, and which district was, by prescription,

at or near a place called Heart-cliffe, in the said township of Denby, in the parish of Penistone aforesaid, and a certain branch or diversion from and out of the said road commencing in the said township of Craggstone, and in the parish of Sandal Magna aforesaid, extending from thence to the Calder and Hebble Navigation, opposite to the Navigation Inn, within the said township of Horbury and parish of Wakefield aforesaid; and also another branch or diversion from and out of the said road commencing in or near a certain close called Pikeley, belonging to *Thomas Richard Beaumont, Esq.* and *Diana* his wife, lying in the said township and parish of Emley, in the riding aforesaid, extending from thence, in a south westwardly direction, through the same townships of Bretton (otherwise West Bretton), Clayton West, and High Hoyland, in the said several parishes of Sandal Magna, Silkstone, and High Hoyland, or some of them, in the said riding, terminating on the common highway in the said last-mentioned town of High Hoyland; *and also another branch or diversion from and out of the said road from or from near the said close, called Pikeley, to the highway leading*

from Emley to Bretton (otherwise West Bretton), near to a place called Bentley Grange, all in the said township of Emley; and also the erecting, making and maintaining such bridge or bridges over the river Calder, and also over the cut or canal, called the Calder and Hebble Navigation, and other brooks and streams on the line of the said intended road and branches or diversions, as may be necessary for continuing and uniting the said road and branches or diversions, and the several parts thereof respectively, and the widening, extending, and improving such of the bridges already erected over the said navigation, and brooks, and streams, as are in the line of the said road, and branches or diversions respectively, will be a great advantage and accommodation to the inhabitants of the manufacturing towns and places in the neighbourhood, and to the public at large." In page 8 of the act it was provided, that the trustees should not take from any person passing through all or any of the said toll-gates, along the whole line of the said roads, more than three full tolls. In page 12, there was a power to the trustees of the road to make two diversions.

liable to repair all the highways lying within it, could not be burthened with the repair of the road in question. The learned Baron told the jury that, on the authority of *The King v. Cumberworth (a)*, it was necessary for the whole length of the main road to be completed, but that it was a question of law, whether it was necessary that all the branches should be completed, and he thought it was not necessary. A verdict was found for the Crown, and the learned Baron gave the defendants leave to move to set that verdict aside and enter a verdict of not guilty. In Easter term, 1835, *J. B. Greenwood* obtained a rule nisi accordingly; against which,

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*Cresswell* and *J. L. Adolphus* now shewed cause. At the trial it was contended, on the authority of the former case of *The King v. Cumberworth (a)*, that this indictment ought to fail. In that case, the main line of road was not completed. There was no thoroughfare from the one extremity to the other of the main line which was the very object of the act. It appears also that the judgment in that case proceeded in some measure on the now exploded doctrine of adoption. Lord *Tenterden*, in the course of delivering his judgment, said, that if there had been no decision on the subject, he should have entertained some doubt. His lordship's doubts were quite warranted. The decision relied on was *The King v. Hepworth (b)*, and that proceeded on the doctrine of adoption. Stress was laid by Lord *Tenterden* on the argument, that if the whole road were not made, a parish might be liable to repair a part of a road of no use to the public. But if a road be not useful to the public, they will not travel upon it. If they do use it, how can the parish refuse to repair and make it good? The test whether a road be public or not is, have the public a right to, and do they in fact, use it? If the public have the right, no reason can be assigned why the parish should not repair. If a part of a road was made under a local statute, thrown open to the public, and used

(a) 3 B. & Ad. 108. (b) Cited in *Rex v. Cumberworth*, 3 B. & Ad. 108.

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for many years, and a person travelling along that road had an action of trespass brought against him, and he justified that the road was a public road, a novel and difficult question of law would be raised. It would be a decision of great hardship, if it were held that the public could not use the road, because certain trustees had not performed what a statute required them to do. [Coleridge J. Who is to give the public the right? Generally these road acts are limited to twenty years duration, at the end of that term how have the public acquired any right? A road in such a case, in the opinion of Parke J. in *The King v. Mellor* (a), would clearly cease to be public.] If the trustees purchase land and throw it open to the public, the trustees dedicate it to the public. [Lord Denman C. J. Do you say that *The King v. Hepworth* (b) proceeded on the doctrine of adoption?] Mr. Baron Hullock seems to have put the non-liability of the parish to repair in that case in this way, if the statute is relied on, it has not been complied with; if dedication is relied on, there has been no adoption by the parish. The point urged in *The King v. Edge Lane* (c) was the same as in *The King v. Cumberworth*, the main line of road had not been completed. It cannot be considered as carrying that decision further. In the present case the complaint is, that one of the branches has not been completed. In *The King v. The Justices of the West Riding of Yorkshire* (d) an opinion was expressed, that where there was a main line of road and several branches, the former might become a public road, although the latter were not made, and that *The King v. Cumberworth* did not apply. In that case, before the road or branches became public, the act required a certificate by two justices, that the main road and branches respectively were properly made. Reliance was placed on the word "respectively." It could, however, scarcely be intended by the legislature, with respect to that road, that if a very

(a) 1 B. & Ad. 32—38.


(c) 6 N. & M. 81.


(b) Referred to in *Rex v. Cumberworth*, 3 B. & Ad. 108.

(d) 3 N. & M. 86; S. C. 5 B. & Ad. 1003.

trifling branch were completed, it should become a public road, and yet that the main line should not be public. The preamble of this act recites, that the making of the main line and branches and the making and improving of certain bridges would be of benefit to the public. Can it be contended, after such preamble, that if the main line and branches were all made and used by the public, the public could be excluded because a single bridge was not made or not improved. A preamble like this, referring to so many things, must be taken distributively. The completion of part may be beneficial to the public. The act speaks generally of the roads which are to be made. If it be said, that the road and branches constitute one road, how would it be possible to describe the termini in an indictment? *Blakemore v. The Glamorgan-shire Canal Navigation* (a) will probably be relied on by the other side, where Lord *Eldon* C. said, that acts obtained by canal companies are to be considered in the nature of private bargains. That may well be with respect to companies who have a power to tax the public for their own benefit, but it is not so with respect to the trustees of a turnpike road, who have merely a trust to execute for the benefit of the public, and who undertake the burden of managing a tax for public purposes. *Bussey v. Storey* (b) affords an illustration of the way in which the Court construes turnpike trusts. The same adverse construction ought not, therefore, to be put on an act for the making a turnpike road, as on canal acts. It will be said that an undertaking has been entered into by the trustees with the public. There being no express undertaking, the Court must see what is the implied undertaking. If part of the road is not made according to the act, upon that part tolls cannot be collected.

*J. B. Greenwood* contra. The completion of the *entire line of road* in this case, was a condition precedent to any part of it becoming a highway and to its being repairable by (a) 1 Mylne & Keen, 162. (b) 1 Nev. & Man. 639; S. C. 4 B. & Ad. 98.

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the district through which it passes. Only one *line* of road is projected by the act of parliament, and the completion of that line is one entire and indivisible undertaking by the trustees. The preamble recites, that "the making a turnpike road and certain branches therefrom, would be a great advantage and accommodation to the inhabitants of the towns and places in the neighbourhood." Then in the clause which names certain persons to be trustees of the road, it is said, "and the said roads and bridges shall be called the Wakefield and Denby Dale turnpike road." The act at p. 8 provides that the trustees shall not take from any person passing through all or any of the toll-gates *along the whole line of the said roads*, more than three full tolls in one day. It is clear that the whole line of the said roads is contemplated in this clause as one undertaking; and yet, if the construction urged for the crown is correct, three full tolls may now be taken from any person who only travels along that part of the line which is finished, and who consequently has not the benefit contemplated by the act, of passing *along the whole line of the roads*, although he may have paid three full tolls. These latter words too are different from the language of the statute in *The King v. Edge Lane* (a), where the words were, not "the whole line of the said roads," but "on each line of the said roads." Other clauses of the act in question show that *one line of road only* was contemplated. In page 12, the language used is "the line of the said new road;" and there is also a power there given to the trustees to make two diversions therein specified, "*if they shall think proper*;" so that the legislature knew how to adopt fit language for the purpose, when they intended to give a discretion to the trustees as to whether a portion of the contemplated project should be made or not; but no such option is given to the trustees with respect to making the branch in question. This is an act introduced by the trustees themselves, and such acts are to be considered in the light of contracts entered into by them with the public. In *Blakemore v. The Glamorganshire*

(a) 6 Nev. & Man. 81.

*Canal Navigation* (a), Lord Eldon C. said, "When I look upon these acts of parliament, I regard them all in the light of contracts made by the legislature on behalf of every person interested in any thing to be done under them." And again, "those who come for them to parliament, do in effect undertake that they shall do and submit to whatever the legislature empowers and compels them to do, and that they shall do nothing else; that they shall do and shall forbear all that they are thereby required to do." Lord Lyndhurst concurred with Lord Eldon and Lord Wynford in considering the acts in the light of a bargain between the company and the plaintiff. *The King v. Greenwich Railway Company* (b) is also an instance of the mode in which the Court construes acts of this description. The substantial question is, are the previous cases of *The King v. Cumberworth* (c), and *The King v. Edge Lane* (d) to be supported. *The King v. The Justices of the West Riding of Yorkshire* (e) is distinguishable from this case. The act there contained the word *respectively*, and the judgment of the Court proceeded on that ground. Littledale J. there says, "the effect of that clause, in which the word "respectively" occurs four times, is to make each road, as soon as it is complete, a public road." It is said that the preamble here is to be taken distributively, if the word *respectively* were inserted in it, as it is in the *Leeds and Whitehall Road* case (e), that might be successfully contended; but in the absence of that word, the Court will infer a contrary intention on the part of the legislature. The object of the act was to open a line of road between Wakefield and Denby Dale and the adjacent populous districts, and it was on those terms that the act was obtained. If either less accommodation had been offered to the public, or the communication had been less than is professed to be given in the preamble, the act might have been refused by the legislature. The inhabit-

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(a) 1 Mylne &amp; Keen, 162.

(b) 4 Nev. &amp; Man. 458.

(c) 3 B. &amp; Ad. 108.

(d) 6 Nev. &amp; Man. 81.

(e) *The King v. Justices of the*  
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& Man. 86; S. C. 5 B. & Ad. 1008.

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ants of the district into which this branch would open a communication, may have been induced not to oppose the bill in parliament, on the condition that this branch would be made. If it had been intended that the main line should be a public road, although the branches were not made, there would have been no difficulty in introducing a clause to that effect.

Lord DENMAN C. J.—It appears to me we ought to adhere to the authority of the cases of *The King v. Cumberworth* (a) and *The King v. Edge Lane* (b), and although striking distinctions may be drawn between those cases and the present, as to the particular part of the work remaining to be done, yet it seems to me we should introduce the greatest possible inconvenience, if we were to enter upon the inquiry as to how much of what is required by the act has been done, or how little left undone. It is safer to say, —and the authorities require us to say—that *the whole undertaking* of the trustees *must be performed* before they can call on the parishes to repair the roads they make. If any part is left undone, we must say the whole is incomplete, otherwise minute distinctions will be perpetually made. Here the whole main line has been completed, but the branches have not. In the former case of *The King v. Cumberworth* (a) a great portion of the main line had been made, and it joined at each end on public roads, so that the portion made had become a public road so far as the mere adoption of it by, and a user on the part of the public could constitute it a public road, and the parish would have been as much liable on that account to repair as in the present case. The branches may have been considered much more important than the main line itself, and, in fact, may have been the inducement for the legislature to give power to these trustees to make the roads in question. It is impossible for us therefore to distinguish between the branches and the main line. The undertakers have not completed their bargain and engagement with the public. I think

(a) 3 B. & Ad. 108.

(b) 6 Nev. & Man. 81.

therefore we are bound to say, that the verdict which has been found for the Crown must be set aside, and entered for the defendants.

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PATTESON J.—I entirely agree with my lord, and I think that we ought to adhere to the former decisions. I am afraid if a distinction is made between this and the former cases, it will lead to serious inconvenience. Acts of this kind certainly constitute a species of bargain, by which lands are allowed to be taken by the trustees, upon certain conditions, for the purpose of making roads, and unless the trustees do all they have engaged to do, they do not complete the bargain they have made. That is the principle of the decision in the former case of *The King v. Cumberworth (a)*, and it seems to me that it applies to this case also. Although this decision may be inconvenient to a great number of public trustees, I cannot help thinking, that we should be introducing a greater inconvenience and giving greater dissatisfaction if we were to adopt the distinction contended for.

WILLIAMS J.—I am of the same opinion. We ought to adhere to the principle of the two cases to which reference has been made. In this case, the completion of the whole line with all its branches, must be considered as a condition precedent to the liability to repair any portion of the line of road in question. It is impossible to say upon what terms and with what views the parties, through whose land the line of road was to pass, have been induced not to oppose the passing of this act through parliament. It may have been, that though they might derive some benefit (a very minute one, perhaps,) from the completion of one line, namely, the principal one, as it is called; yet some great additional benefit and accommodation might result to them from the completion of the road in its other branches, which might therefore have been the ground for their not opposing the passing of this act through parliament.

(a) 3 B. & Ad. 108.



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COLERIDGE J.—I am of the same opinion. The principle on which this case was argued for the crown, at first sight appeared to me sound, for it seemed to present an intelligible distinction between this case and *The King v. Cumberworth* (a) and *The King v. Edge Lane* (b). But when I come to ask myself what right there is to burden this district with the repair of this road, or what right the trustees had in the first instance to take away land from the owners on this line of road, I cannot find that there is any sound distinction. It seems to me, the only way in which those questions can be answered satisfactorily, is by resorting to the broad ground, that these acts of parliament are to be considered as bargains in which the trustees are the persons interested on the one side, and the legislature on the other, acting not merely on behalf of the great body of the public who travel on the road, but of all those parts of the public who are interested in the consequence of making the road, and that the bargain is, that the trustees shall have the land upon certain trusts, and for certain purposes. If the distinction contended for is correct, namely, that where the main line of road is complete, the trustees have done enough to entitle them to burden the parish, without making the branches, then I ask myself this question (looking to this as a bargain), may not making the branches have been the very consideration for permitting the trustees to make the main line of road? There may have been a very good main line of road before this act of parliament passed, and the new line may have been desirable only for the sake of the branches contemplated, and all the persons who are owners of land in the parishes through which this main line is to go, may have withheld their opposition on the faith that they were going to have these branches made. It seems to me, if that case can be put, and it is not an improbable one, certainly great hardship and injustice would be effected by saying the trustees had done enough in making the main line of road. As that is possible, and it is a case that fre-

(a) 3 B. &amp; Ad. 108.

(b) 6 Nev. &amp; Man. 81.

quently occurs, I cannot agree to lay down a principle that would, by a decision of this Court, make an injustice of that sort legal. We must recollect that the bargain made is to execute an entire undertaking, and the trustees must comply with all and every part of their undertaking before they can call upon any portion of the public to be burthened with the repair of any part of the road.

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Rule absolute.

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Tuesday,  
Nov. 23d.

**ASSUMPSIT** against the defendant, as acceptor of five bills of exchange, for 50*l.* each. The first count was upon a bill of exchange payable three months after date. The second count was on a bill payable six months after date. The third count was on a bill payable nine months after date. The fourth count was on a bill payable twelve months after date. The fifth, was on a bill of exchange payable fifteen months after date.

The plea, to an action of assumpsit against the defendant, as acceptor of several bills of exchange, stated, that after the accepting of the bills, and after the time of payment, the defendant be-

Plea: that after the accepting of the said several bills of

being resident in Scotland, in consideration that certain of his creditors should forbear to sue, made his deed, by which deed, stamped and attested, according to the law of Scotland, he the defendant assigned his personal property in Scotland, for the benefit of his creditors; that notice of the deed was given to the plaintiff, and that by his writing, signed by him, and which writing was by the law of Scotland valid and effectual in that behalf, he did nominate *R. H.* as the attorney of him the plaintiff, and as such attorney authorized him to concur in and adopt the deed, and to receive the dividends. The plea then stated, that *R. H.* had adopted the deed and attended meetings of the creditors; that divers other creditors of the defendant had accepted the assignments in satisfaction of their debts; that the causes of action arose before the execution of the deed, and that sufficient money had become available under the deed to pay all the creditors; and that all and singular the proceedings aforesaid were pursuant to and in conformity with the law of Scotland, whereby and by reason of the said several premises, and by effect of the aforesaid laws, the defendant hath become absolutely discharged from the causes of action.

Replication: that the defendant hath not become, nor is discharged modo et forma.


Held, that by this plea the law of Scotland was put in issue. Secondly, that the plea did not disclose a defence by the law of England, as it did not appear that the plaintiff had executed the deed, or induced any other creditor so to do, or in any way precluded himself from suing on the original debt.

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exchange, and after the time for the payment thereof had elapsed, to wit, &c., he the defendant, being at that time resident in that part of the United Kingdom called Scotland, and subject to the laws thereof, in consideration that certain persons being, or supposed to be, creditors of him the defendant, should forbear to sue or molest the defendant in respect of any debt, monies, or claims, before and at that time due, or supposed to be due and owing to them, or any of them, from him the defendant, made his certain deed or writing, by which said deed or writing, duly stamped and attested according to the law of Scotland, and shewn to the Court here, he the defendant did alienate, assign, dispose, convey, and make over to and in favour of *J. D.*, and to such person or persons as might thereafter be appointed by his creditors, as trustees to and for the use of his said creditors in the said deed mentioned, and of other creditors, whom the said trustees should assume into the benefit of the said disposition, all and sundry his moveable goods, gear, and household furniture, books, paintings, wines, and all other liquors, coin, cattle, debts owing to him, and other effects, and in general the whole moveable estate presently appertaining and belonging to him, and of whatsoever nature and denomination, situated within the kingdom of Scotland, together with the lease of his dwelling-house at Cleminster, to and in favour of the said trustees, and of such other person or persons as might thereafter be appointed by his said creditors as trustees as aforesaid, whom he did thereby surrogate and substitute in his full right and place thereof, in lieu of and in full satisfaction and discharge of all the said debts, monies, and claims, due from him or payable to them the said creditors by him the defendant, and that notice of the execution of the said deed or instrument of disposition was given to divers persons, being, or supposed to be, creditors of the said defendant, as well in Scotland as also in England, and among the rest to the plaintiff. And that the plaintiff, by his writing, signed by him, and which said writing was by the law of Scotland valid and effectual in that behalf, did nominate and appoint one *H. R.*

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as the attorney of him the plaintiff, on that behalf, and as such attorney authorized and empowered him to concur in and adopt the said deed, and to receive the dividends which might or should become due by or in respect of property by virtue of the said assignment. And that the said *H. R.*, by virtue and in pursuance of such nomination, appointment and authority as aforesaid, did nominate and appoint and adopt the said deed, and the provisions thereof, for and on behalf of the said plaintiff, and did act therein as the authorized agent of the said plaintiff, and was appointed one of the committee, chosen by the said creditors, for the payment and distribution of the estate and effects of the said defendant, and attended meetings of the creditors under the said deed, and voted and acted as the representative of the said plaintiff, in the matters thereof, in that behalf; that divers other persons, being creditors of the defendant, to wit, &c., in consideration of the execution of such assignment of the goods and chattels of the defendant, as aforesaid, did agree to accept the assignment of the goods and chattels of the defendant, and did accept the same in lieu of and in full satisfaction of their respective debts and claims; and that from the time of executing the said trust-deed by him the said defendant, and the adoption thereof by him the said plaintiff, as aforesaid, the defendant hath not at any time accepted any other bill or bills of exchange, drawn upon him by the said plaintiff, and that the plaintiff has no cause of action or demand whatsoever against him the said defendant, except the supposed causes of action in the declaration mentioned, and which said several causes of action accrued before the execution of the deed by the defendant, and the adoption thereof by the plaintiff, as aforesaid; and that since the executing of the said trust-deed as aforesaid, by him the said defendant, and the adoption thereof by the said plaintiff as aforesaid, certain funds, goods, and chattels, of him the said defendant, of the value of 2000*l.* and upwards, have become available under the trust-deed for the benefit of the creditors of the defendant, and for the benefit (among others)

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of the plaintiff; and that the said sum of 2000*l.* so made available as aforesaid, is sufficient to pay and discharge all the debts of the said defendant in the said deed mentioned, and among the rest the debt of the said plaintiff; and that all and singular the proceedings aforesaid were pursuant to and in conformity with the laws of Scotland aforesaid, whereby and by reason of the said several premises, and by effect of the aforesaid laws, he the said defendant hath become absolutely discharged, in respect of his person, lands, goods, and chattels, from the several causes of action in the said declaration mentioned.

Replication to the second plea: that the defendant hath not become, nor is he discharged in respect of his person, lands, goods, and chattels, from the several causes of action in the said declaration mentioned, or any of them, or any part thereof, in manner and form as the said defendant hath above in his said plea alleged; concluding to the country. Upon which issue was joined. At the trial, before Lord *Denman* C. J., at the sittings at Westminster, after Hilary term, 1835, the defendant offered no evidence in support of his plea, but contended that the replication did not put in issue any matter of fact, and that therefore he was entitled to a verdict. It was contended by the plaintiff that it was necessary to give some evidence of the law of Scotland. The learned Chief Justice directed a verdict to be entered for the defendant, and gave the plaintiff leave to move to set that verdict aside, and enter a verdict for himself. In Easter term, 1835, a rule nisi was accordingly obtained; against which,

*Erle* and *Sewell* now shewed cause. The contest at the trial was, whether the defendant was bound to give evidence of what was the law of Scotland. The plaintiff having passed over all the circumstances stated in the plea, and replied merely that he was not discharged modo et formâ, thereby admitted all the facts. The plea discloses a defence, not by virtue of the Scotch law, but from facts

which amount to a good defence by the English law. It is true that the Scotch law is averred in the plea, but only so far as relates to the execution of the deed of composition, upon the validity of which, according to the *lex loci*, the defendant rests his case. So far, and no farther, is the Scotch law material, and if the plaintiff had intended to have disputed this, he should have traversed the execution and validity of the deed, or at least used the general replication *de injuriâ*, and not have traversed merely the effect of the deed. If the *virtute cujus* be not traversable, it is only as to the making and validity of the deed that the question of the Scotch law is raised by the plea; and the replication, traversing only the discharge by the Scotch law, admits all these facts, and takes issue on a fact not raised by the plea. Then by the English law the defendant is entitled to judgment. The rule of law is, that wherever a debtor executes a deed of assignment for the benefit of his creditors, and they agree to the terms of the deed, the creditors cannot resort to the original demand, on two grounds; 1st, because they cannot place the debtor in the same situation he was in before the assignment took place; *Butler v. Rhodes* (a), *Heathcote v. Crookshanks* (b), *Seager v. Billington* (c); and 2dly, because it would be a fraud on other creditors, who may have accepted the composition; *Steinman v. Magnus* (d), *Wood v. Roberts* (e). But it will be contended by the other side, that the replication puts in issue all the facts contained in the plea, and that the averment, in the *virtute cujus*, of the discharge by the law of Scotland, is a material fact, properly traversed by the replication. This must depend upon the nature of the *virtute cujus*. If it contains that which is purely matter of law, it is not traversable; if it be mixed up of law and fact, then it is traversable; *Lucas v. Nockells* (f). The proper test is,

(a) 1 Esp. 236.

(b) 2 T. R. 24.

(c) 5 C. &amp; P. 456.

(d) 11 East, 390.

(e) 2 Stark. 417. But see the

observations of Lord Abinger C. B. on this case in *Reay v. Richardson*,

2 C. M. &amp; R. 422-8.

(f) 10 Bingh. 157.

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whether the plea is perfect without it. There is no technical virtue in the words *virtute cujus*. Its proper effect is to collect the facts stated in the plea, and draw an inference from them; and it is so laid down by *Littledale J.* in *Lucas v. Nockells*. Here the plea is complete without the *virtute cujus*, which may be rejected as surplusage, and the replication having taken an immaterial issue, as the facts of the plea amount to a good defence at English law, the defendant is entitled to judgment.

*Smirke* (and *Peacock* was with him) contra. The replication does not traverse mere inference of law, but mixed matter of law and fact, which is a good traverse (a). It in effect denies that the matters pleaded are a defence by the law of Scotland. Supposing them to be true, the law of Scotland is pure matter of fact (b). Even if it had been a traverse of a mere inference of English law, yet as the defendant has not demurred, he has consented to refer the matter to a jury. It is now contended, however, that the defendant is at liberty to reject all mention of the Scotch law, and insist on the plea as a defence by the law of England. It is at least doubtful whether he has a right to do so, as he plainly relies throughout on a Scotch discharge, and almost every allegation of an act done depends for its validity on that law. But if we suppose all reference to it expunged, there is no defence by our law. The plea does not allege that plaintiff ever promised to forbear, or that he or the creditors in general accepted the executory agreement in satisfaction (c). The word *adoption* is ambiguous; the authority to adopt was not given by deed, nor does it appear that the trustee ever assumed or admitted the plaintiff to the benefit of the trust, or even himself accepted the trust. It is, in fact, only a partial trust in favour of certain creditors, to which plain-

(a) *Grocer's Company v. Archbishop of Canterbury*, 3 Wils. 221—234.

(b) *Mule v. Roberts*, 3 Esp. 163.

(c) See *Fitch v. Sutton*, 5 East, 230; *Reay v. Richardson*, 2 C. M. & R. 422.

tiff was not a party, from which he has received no benefit; nor has any other creditor suffered any prejudice from any default or deception by the defendant. If the learned judge had not reserved leave to move, the plaintiff would have moved for judgment *non obstante veredicto*, inasmuch as the plea is supported neither by the law of England, nor by international comity; for the debt sued for does not appear to have arisen in Scotland, and is therefore, at all events, not barred by a Scotch discharge. (Here he was stopped by the Court.)

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LORD DENMAN C. J.—We are satisfied this is a replication that puts the law of Scotland in issue. Part of the plea is, that by the law of Scotland the party was discharged. The traverse of that discharge is a traverse of the law of Scotland. It is argued that all relation to the law of Scotland may be rejected entirely, as the plea discloses a good defence by the English law. It does not, however, appear that any act has been done by the creditor binding him not to sue the debtor. There has been no deed binding him, and it does not appear that any other creditor is prevented from suing the debtor for the amount of his debt. I think therefore that the plea does not state any defence by the laws of this country, and that the plaintiff has entitled himself to a verdict for the amount of the bills.

PATTESON J.—At first I thought this was an application to enter up judgment, notwithstanding the verdict. That the party could not do, unless the plea, admitting the facts stated in it, clearly amounted to no defence at all. But that is not the case. This is an application to enter up the verdict for the plaintiff. It is clear, by the language of this plea and the replication, that the Scotch law is put in issue. The plea states the law of Scotland, and concludes that by reason of the said premises, and by the effect of the said laws, the defendant was absolutely discharged. The repli-



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cation says he is not absolutely discharged in manner and form aforesaid. It seems to me the replication did put in issue the Scotch law, and the defendant was bound to give evidence of it. But then it is said that we may reject all that part of the plea which refers to the Scotch law, for there is a defence by the English law. I doubt if it is possible to do that in the case of a plea framed as this is. But whether or not that could be done is immaterial, since it is clear there is not any defence according to the English law. It is not stated that the plaintiff executed a deed of composition, or had induced any other person to do so, or that he would do so. All that is stated is, that he had notice of a deed executed according to the law of Scotland, and having notice, the plaintiff, by his writing signed by him, and which writing was by the law of Scotland valid and effectual in that behalf, did nominate and appoint one *H. R.* as the attorney of him the plaintiff, and as such attorney authorized and empowered him to concur and adopt the said deed, and to receive the dividends. The plea then goes on to state, that the agent, *H. R.*, adopted the deed, and attended meetings of the creditors. It does not at all appear that the plaintiff executed the deed. The law of England knows no such phraseology as this plea contains. If a creditor act under a composition deed, and receive dividends under it, he cannot be permitted to prove that it is fraudulent and an act of bankruptcy; but that is not the present case. There is nothing in the plea which says that the plaintiff had in any way put the defendant into a different situation from what he was before, according to the English law, or that any fraud was committed upon him. There is in truth nothing on the face of the plea therefore which makes out a defence under the English law.

WILLIAMS J. and COLERIDGE J. concurred.

Rule absolute.

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Thursday,  
Nov. 24th.

DOE *d.* BURGESS and another *v.* THOMPSON.

**EJECTMENT**, for freehold and copyhold lands in the county of Cambridge. On the trial before *Tindal C. J.*, at the last assizes for the county of Cambridge, the following appeared to be the facts of the case:—

In 1787, the property in question was conveyed to *William Thompson* in fee. *William Thompson* was the father of *James Thompson*, and the grandfather of *John Thompson*, the defendant.

In 1807, on the marriage of his son *James*, *William Thompson* put him in possession of the lands in question; and *James* continued to cultivate them until his death in 1831: after which, first, his widow, and then the defendant, his son, entered upon them, the latter continuing in possession till the present time.

The question at the trial was, whether *William Thompson*, the grandfather, had given absolutely to his son *James* the land in question, or only during pleasure, retaining the right to resume the possession whenever he thought proper.

*William Thompson*, the grandfather, died in September, 1833, having previously in the same year made his will, whereby he devised all his lands, in general terms, to the plaintiffs in trust, to sell and divide the proceeds amongst certain persons therein named. In pursuance of this power, the plaintiffs sold the copyhold to one *Susannah Thompson*, who was immediately admitted.

In April, 1836, *Susannah Thompson* made a conditional surrender of the same premises to the plaintiffs. On the 19th of July, 1836, (a few days before the trial) the plaintiffs were admitted, "at a special court of *Joseph*, lord

tions of 3 & 4 Will. 4, c. 27, but was saved by the 15th section of that statute, being brought within five years from the passing of the act.

3. Where *J.*, who was tenant at will to *W.*, died, and the defendant, who was heir at law to *J.*, entered into possession, and claimed the land as his own:—Held, that the devisees of *W.* might bring an ejectment against the defendant, without giving him notice to quit or demanding possession.

1. The legality of the title of the lord or steward who admits a copyholder, is immaterial, provided the admission is in pursuance of a surrender, and not of a voluntary grant from the lord.  
2. *W.* permitted *J.* to occupy land of which he was seised in fee for twenty years previously to *J.*'s death in 1831: *W.* died in Sept. 1833, and the defendant, who was the son and heir at law of *J.*, occupied till 1836. On ejectment, brought by the devisees of *W.*, it was found by the jury that the possession of *J.* was not adverse to *W.*:—Held, that the right of action in the devisees was not barred by the 2nd and 7th sec-

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bishop of Ely and lord of the manor of Ely Barton, before *Hugh Evans*, steward of the said manor." It was objected, that as *Dr. Joseph Allen*, the bishop, had not been confirmed in the see, and the see was vacant at the time this court was held for the admittance of the plaintiffs, what then took place was invalid. No evidence, however, was given that *Dr. Allen* had not been confirmed in the see; and the learned Chief Justice received the evidence. A verdict passed for the lessor of the plaintiffs, and the jury found specially that *James Thompson* had held the lands for upwards of twenty years before his death, but that he had not held them *adversely* to *William Thompson* the grandfather.

*Gunning*, on a former day in this term, moved for a rule to shew cause why the verdict should not be set aside, and a new trial had or a nonsuit entered, on the ground, first, that the plaintiffs failed to establish any valid title to the copyhold lands; and with respect to this point an affidavit was produced, by which it appeared that *Dr. Sparkes*, the former bishop of Ely, died in April, 1836; that *Dr. Joseph Allen*, bishop of Bristol, was thereupon translated to the see of Ely, and that he was not confirmed in the see, and the temporalities of the see were not restored to him by royal grant till the 19th of August following. The admission of the plaintiffs was in July, at a court purporting to be a court of "*Joseph*, lord bishop of Ely," of which see the manor of Ely Barton (in which the copyhold lands lie) is parcel.

First point:  
The steward  
no authority  
to hold a  
court.

I. It appears by *Burn's Eccl. Law* (a), that during the vacancy of a bishoprick the temporalities belong to the king, who usually grants them *ex gratiâ*, after confirmation, to the bishop newly appointed. The steward of the manor had therefore no authority to hold a court at the time of the

(a) Ecclesiastical Law, tit. "Bishops," VI. And see *Covert's* case, Cro. Eliz. 754, where it was held, that a grant by Queen *Eliza-*

*beth* of a copyhold which escheated, while the temporalities of a bishoprick were in her hands, was good.

admission of the plaintiffs in July; and consequently as to the copyholds no title was made out, and the defendant is entitled to a verdict for them or a new trial: *Coke's Copyholder* (a).

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II. The plaintiffs were barred by the recent statute of 3 & 4 Will. 4, c. 27, from all claim to any portion of the property. By the 2nd section it is enacted, "that no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry, or to bring such action, shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same."

Second point :  
 The claim  
 barred by  
 3 & 4 W. 4,  
 c. 27.

The 7th section enacts, "that when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined."

The defendant's father, for more than twenty years, and the defendant, for five years since his death, was tenant at will (b), of *William Thompson* the grandfather, of the lands in dispute; consequently, more than twenty years have elapsed since the commencement of such tenancy; and the tenancy never having been determined, the plaintiffs were

(a) 154. But see 3rd resolution in *Chudleigh's* case, 1 Rep. 140 b, where it is laid down that in admittances by surrender, the lord's title shall never be called in question, as his admittance is

merely a judicial act. See also *Clarke v. Pennifather*, 4 Rep. 23 b, and Co. Com. Cop. 91.

(b) Com. Dig. tit. "Estates," (H 1.)

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 Thompson.

Third point:  
 No determination of the  
 tenancy at  
 will.

barred by the express and clear provisions of this section, which is uncontrolled by the 15th section (a), as that clearly does not apply to the case of a tenancy at will. The 7th section, by which the right of the testator, and consequently of the plaintiffs, is barred, is free from any ambiguity; and the defendant is entitled to a nonsuit.

III. But even though that should not be so, still, thirdly, there having been no notice to quit, nor any demand of possession, or any determination of the tenancy at will, the defendant could not be treated as a trespasser. *Co. Litt. (b)*, *Com. Dig. (c)* and the authorities there cited, shew that the tenancy was not determined by the devise to the plaintiffs (d).

Lord DENMAN C.J.—We will confer with *Tindal* C.J.

*Cur. adv. vult.*

First point.

Lord DENMAN C.J. now delivered the judgment of the Court.—A nonsuit or a new trial was moved for in this case on several grounds, none of which we think tenable. With respect to the admission of improper evidence, it appeared on affidavit that the lessors of the plaintiff, who claimed as devisees under the will of one *William Thomp-*

(a) The 15th section enacts, "that when no such acknowledgment as aforesaid shall have been given before the passing of this act, and the possession or receipt of the profits of the land, or the receipt of the rent, shall not, at the time of the passing of this act (the 24th July, 1833), have been adverse to the right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him, may, notwithstanding the period of twenty years, hereinbefore limited, shall have expired, make an entry or distress, or bring an action, to

recover such land or interest at any time within five years next after the passing of this act."

(b) *Co. Litt. 55 b.*

(c) *Com. Dig. tit. "Estates," (H 6); Hinchman v. Iles, 1 Vent. 247.*

(d) But a tenancy at will is determined by the death of the lessor; *Carpenter v. Collins, Moor, 774; Com. Dig. tit. "Estates," (H 6); and Co. Litt. 55 b;* although the tenant may occupy till the next rent day paying rent, or take the summer profits, if the tenancy commenced at Michaelmas. *Cruise's Dig. tit. ix. c. 1, s. 14.*

son, had been admitted at a court held by the steward of the manor, as steward and in the name of the present bishop, before any grant to him of the temporalities of the see of Ely, the copyhold land in question being holden of a manor which was parcel of the see. We are of opinion that as the admission of the plaintiffs was made in pursuance of a surrender, or what by statute is equivalent thereto, and not as, or in consequence of, a voluntary grant by the lord, that the lord's title was immaterial. It was contended also, that under the 3 & 4 Will. 4, c. 27, the continued possession for twenty years by *James Thompson*, during the lifetime of *William Thompson*, barred the lessors of the plaintiff, who were the devisees of *William Thompson*. But the jury have found that the possession of *James Thompson* was not adverse to *William Thompson* the testator; and as the present action is brought within five years after the passing of the statute 3 & 4 Will. 4, c. 27, the proviso in the 15th section of that statute saves the right of the lessors of the plaintiff.

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 Doe  
 v.  
 THOMPSON.  
 Second point.

Rule refused.

BALLANTINE v. TAYLOR.

*HUMFREY*, in this term, had obtained a rule, calling upon the plaintiff to shew cause why the defendant should not be allowed his costs, pursuant to the statute 43 Geo. 3, c. 46, s. 3.

The affidavit of the defendant, upon which the rule was obtained, stated that the defendant had been arrested at the suit of the plaintiff for the sum of 20*l.* 2*s.* 1*d.*, and that no bill of particulars of plaintiff's demand against the defendant had been delivered to him by the plaintiff, or by any person on his behalf, previous to his being arrested, beyond

of particulars, and got a verdict for 10*l.*; on an affidavit of the defendant that he never owed the plaintiff 20*l.*, the Court gave him his costs under 43 Geo. 3, c. 46, notwithstanding the plaintiff swore that all the articles in the bill of particulars were delivered to the defendant.

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 Nov. 24*th*.  
 Arrest for  
 20*l.* 2*s.* 1*d.*  
 for price of  
 goods sold.  
 Plea, infancy.  
 Replication,  
 that the goods  
 were neces-  
 saries. At  
 the trial the  
 plaintiff suc-  
 ceeded in  
 proving the  
 delivery of  
 certain articles  
 only in his bill

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the sum of 9*l.* 9*s.* 9*d.*, and that a sum of 5*l.* 15*s.* 3*d.* had been paid to the plaintiff on account thereof, and that the defendant did not, at the commencement of the suit, or at any time since, owe the plaintiff 20*l.*; and that at the trial of the cause, before Lord *Denman* C. J. at the sittings in London, in last Trinity term, the plaintiff recovered a verdict for 10*l.* The bill of particulars, delivered after action brought, amounted to 25*l.* 17*s.* 4*d.*; credit was given for 5*l.* 15*s.* 3*d.*

The affidavits in answer stated, that the action was brought to recover the price of certain hosiery goods sold to the defendant, all of which the defendant and his shopman swore had been delivered to the defendant; that the defence set up by the defendant was infancy, to which the plaintiff replied, that the goods were necessities; that the defendant failed in his defence, but that plaintiff could only prove the delivery of 10*l.* worth of goods, as part of the goods had been delivered across the counter by the plaintiff himself.

That the plaintiff had made several applications to the defendant, for the amount of his bill; and that in answer to a letter written by the plaintiff, the defendant wrote to him as follows:—"I have received your letter, and beg to inform you, that I told you if you called upon me on the day after, I would be at home; I then intended to have made some arrangements; but if you think you can recover the bills by law, you had better try it. I never wished to have robbed you of one farthing."

That the plaintiff, in consequence of such letter, suspected it was the intention of defendant to act dishonestly; and believing in the competency of defendant to pay his demand, he directed his attorney to arrest him for the balance due, 20*l.* 2*s.* 1*d.*, if the defendant refused to pay.

Sir *F. Pollock*, and *Swann*, now shewed cause. The affidavits of the defendant do not deny the receipt of a single article, for which he is charged by the plaintiff in his

bill of particulars. He only shews that he did not receive a bill of particulars before his arrest; but he may have had a bill of parcels delivered with every article as it was sent home to him. He shelters himself under the general allegation, that he does not owe 20*l.*, relying, perhaps, on some article being charged 2*s.* 2*d.* too much. The substantial issue at the trial was infancy, and on that the plaintiff succeeded; he was unable to recover the whole amount, from the difficulty of proving the delivery of articles sold and delivered across a counter. The result of the different cases on this statute is, not that the defendant is entitled to his costs, if the plaintiff recovers less than the sum arrested for; but he must also shew that there was no reasonable or probable cause for the plaintiff to expect to recover more. *Cawthorne v. Cawthorne* (a), *Twiss v. Osborne* (b), *Graham v. Beaumont* (c), and *Stovin v. Taylor* (d).

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 BALLANTINE  
 v.  
 TAYLOR.

*Kelly*, contra, was stopped.

*Per Curiam* (e).—It has always been held, that the damages recovered by the plaintiff are *prima facie* evidence of the sum due from the defendant. The sum here claimed is only just sufficient to entitle a plaintiff to arrest, and it is impossible to help suspecting that the plaintiff has worked himself up to make an affidavit of a debt, without reasonable or probable cause. The conduct of the defendant certainly cannot be approved of; but it is well that the parties should know, when a debt amounts just to 20*l.*, the risk they run in making an arrest.

Rule absolute (f).

(a) 4 Dowl. P. C. 182.

(b) 4 Dowl. P. C. 107.

(c) 5 Dowl. P. C. 49.

(d) 1 N. & M. 250; 1 Dowl. P. C. 697, 8. C.

(e) Lord Denman C. J., *Patterson and Williams* Js. *Coleridge* J. was sitting in the Bail Court.

(f) See *Nicholas v. Hayter*, 2 A. & E. 348.



1836.

Thursday,  
Nov. 24th.

Pending an appeal at sessions against a removal on a settlement by service under an unstamped assignment indorsed on indentures of apprenticeship, the overseers of the respondent township applied for a mandamus to the overseers of the appellant township to produce the assignment to be stamped, this Court refused the writ.

The KING v. The Overseers of WESTOWE.

**CRESSWELL**, on a previous day in this term, had obtained a rule calling upon the overseers of the township of Westowe, in the county of Durham, to shew cause why a mandamus should not issue to them to produce at the Stamp Office, to be stamped, the assignment indorsed on an indenture of apprenticeship under which the apprentice, a pauper, had been assigned to and had served a master in Westowe. The application was made on behalf of the overseers of Scarborough, in the North Riding of Yorkshire, upon affidavits stating that the pauper had been removed from Scarborough to Westowe, on his examination shewing a settlement there by several years' service as an apprentice; that Westowe had appealed; that at the last Midsummer sessions the appeal had been respited to give time for an application for a judge's order to produce; that such an order had been refused by *Parke B.* and *Coleridge J.*; that at the last Michaelmas sessions the appeal had been further respited, to give time for the present application.

*Bliss* now shewed cause. There is no instance of the Court granting a mandamus in a case like the present. The application seems to be founded on the analogies of a mandamus for inspection, and of the power which this Court exercises between parties in a cause pending, of ordering instruments to be produced for stamping; but this case comes within neither. As to a mandamus for inspection, the rule has been, ever since *The Mayor of Southampton v. Graves (a)*, that it only lies to inspect documents kept for the use of a body of persons, of whom the applicant is one. *Rex v. Bishop of Ely (b)* may be thought to go further, in which a mandamus went to the bishop to inspect his registry of presentations to livings in his diocese, but Lord *Tenterden C. J.*, founded his judgment expressly on

(a) 8 T. R. 590.

(b) 2 Mann. & R. 127; 8 B. & C. 112.

the ground of a bishop's registry being kept for the use of all persons claiming title to livings in the diocese, and distinguished it from parish books which are kept for the use of the parishioners only. In the case of parochial documents, the right to inspect lies under the further restriction, that the applicant must not claim adversely to the parish, *Cox v. Copping* (a), *Rex v. Smallpiece* (b). Here the parties making the application are both strangers and adversaries to the parish of Westowe, and if they are entitled to inspection of these indentures, they are entitled to see any other instrument by which a settlement is claimed, as the conveyance of an estate or the demise of a tenement, and the parties might be compelled to give up deeds defeating their own estate.

Again, if there were a cause pending between these parties, the Court would not order the instrument to be given up to be stamped. *Ratcliffe v. Bleasby* (c) is the leading authority upon this point. Three things must concur before the Court will exercise their jurisdiction in ordering the production of an instrument for stamping. First, the party applying in the action, must be actually or substantially a party to the instrument: Secondly, the action pending must be upon the instrument itself: and lastly, the party holding the instrument must hold it as a trustee, or with an implied covenant to produce it; *Taylor v. Osborne* (d), *Cocks v. Nash* (e), *Lawrence v. Hooker* (f), *Street v. Brown* (g). None of these circumstances exist here. The parish of Scarborough has no interest in the indentures, in the legal sense of the word; they are perfect strangers to the deed, and therefore the case cannot be likened to *Bateman v. Phillips* (h), where the ground for ordering a paper to be stamped, assigned by *Mansfield C. J.* was expressly, "that the plaintiffs were as much parties

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(a) 5 Mod. 396; S. C. 12 Vin.  
Abr. Evid. (F. b). pl. 3; S. C. 1  
Lord Raym. 337.

(b) 2 Chit. R. 288.

(c) 3 Bing. 148.

(d) Cited in *Bateman v. Phillips*,  
4 Taunt. 157.

(e) 9 Bing. 723.

(f) 5 Bing. 6.

(g) 6 Taunt. 302.

(h) 4 Taunt. 157.

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 Westowe.

to the paper as if they had signed it." Here the only interest which Scarborough can claim is through something collateral to the deed, viz. service under it. Therefore, if the settlement were a cause here pending, it would be neither between parties interested in the indenture, nor would it be founded upon the indenture, but on something wholly collateral. But further, it must be made out that the parish of Westowe holds these deeds as trustees for Scarborough; *Street v. Brown* (a), *Cocks v. Nash* (b). It is not sufficient that they hold the deeds as trustees for any one else. "Over trustees, as trustees, this Court has not jurisdiction," per *Alderson J.* (b) And there is a late case in the Exchequer, *Travis v. Collins* (c), where the same rule is recognized.

Next, this power of ordering instruments to be stamped is under the summary and equitable authority of this Court; but the writ of mandamus is under the ordinary and common law jurisdiction: the latter, therefore, cannot be extended by any analogy derived from the former. A mandamus issues only upon a strictly legal right. There is another ground why this mandamus should be refused. It not only will not contain any suggestion of a legal right, but the right suggested in the affidavits is founded on something incapacitated by statute, viz. an unstamped instrument. Where in an action at law the right depends on any instrument required to be stamped, the action would fall to the ground immediately on its appearing that the instrument was not stamped; *Hunt v. Stevens* (d), *Jackson v. Warwick* (e), and *Aldridge v. Ewen* (f). The only difference in this view of the question between those cases and the present is, that there the evidence to sustain the writ or action follows, and here, by the forms of business, precedes it. The provisions of the stamp acts are (g), that no unstamped instrument shall be pleaded or given in evidence, or be good, useful, or avail-

(a) 6 Taunt. 302.

(b) 9 Bing. 723.

(c) 2 C. & J. 625.

(d) 3 Taunt. 113.

(e) 7 T. R. 121.

(f) 3 Esp. 188.

(g) 9 & 10 W. 3, c. 25, s. 59.

able. This mandamus is applied for on evidence of an unstamped instrument. The affidavits here are in the nature of a plaint, upon which the writ is to issue, for remedy of a right claimed through and depending upon an unstamped instrument; which must even be suggested in the writ itself in order to shew the party's title.

Again, it does not appear but that this indenture was executed before the 44 *Geo. 3*, c. 98, in which case it could only be stamped within the time prescribed by 8 *Ann.* c. 9, *Rex v. Chipping Norton* (a); and the Court will not grant a mandamus, unless it sees that it is for a legal purpose.

Lastly, if the Court were to grant the rule the rights of third parties might be involved, *Lawrence v. Hooker* (b); the master might be exposed to actions for the bond of the apprentice, which are not sustainable on an unstamped instrument. So also he might incur the penalties imposed by old statutes for taking more than a certain number of apprentices, if the deed were stamped.

If it be attempted to support this rule on the ground of a mandamus to public officers to discharge their duty, it must be shewn that the act commanded to be done is a duty arising from the very nature of their office, and enjoined by the statutes creating it. A mandamus will no more lie on that ground for overseers of the poor to assist in stamping an indenture, than for commissioners of stamps to assist in making a poor's rate. Besides, as the applicant must then also shew his interest in the execution of the duty, the same objections of want of title and incapacity are equally applicable to this ground.

*Cresswell* contrâ. The question is, whether the overseers of Westowe have a right to detain these indentures, when a wrong would be thereby sustained, which cannot be redressed except by this Court. It is said that

(a) 5 B. & Ald. 412.

(b) 5 Bing. 6.

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production can only be ordered when there is a suit between the parties; but there was no suit in *Rex v. Bishop of Ely* (a); and if it be necessary that the instrument should be held in trust, the overseers do hold in trust, for the legislature having thrown upon parishes a public duty to perform as to the settlement of paupers, all the public are interested in the books and deeds relative to such settlement. What are the dangers to be encountered from the production of an indenture of apprenticeship? A private party is not compellable to produce an instrument which is the title-deed of his property, and on that ground alone it was that Lord *Kenyon* decided in *Mayor of Southampton v. Graves* (b): his lordship said, "I cannot conceive why an inspection of the muniments of a corporation should be granted, when a similar inspection would be denied if the suit were between private persons only." But this is not a muniment of title; it is a document held by the parish officers for public purposes, and if held back great injustice will be done.

Lord DENMAN C. J.—I am clearly of opinion that this rule must be discharged. When the argument for the right of inspection is founded on the deed being a document in which the public are interested, it is impossible to accede to that argument.

PATTESON J.—It is only on the ground of interest that the parish of Scarborough can have a claim to the inspection of these deeds, and it is upon that, that most of the cases which have been recently decided turn. Those cases have been cited to shew that the inhabitants of Scarborough have not such an interest as to entitle them to an inspection. But Mr. *Cresswell* does not pretend to rest his claim on that ground, but solely on these being public documents; but there is no doubt that parish books and papers are not public documents. The injustice to the public of withholding

(a) 2 Mann. & R. 127; 8 B. & C. 112.

(b) 8 T. R. 590.

these deeds is then insisted upon ; but what does it signify to the public where the pauper is settled ? Some parish or other is bound to support him.

WILLIAMS J. concurred (a).

Rule discharged.

(a) Coleridge J., was sitting in the Bail Court.

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WESTOWE.

FOWELL and another v. PETRE.

Thursday,  
Nov. 24th.

IN this case the defendant was detained on the 26th October last in the custody of the sheriff of Middlesex, on a *capias* issued out on the same day, at the suit of the plaintiffs.

The affidavit to hold to bail stated, that "*Philip William Petre* is justly and truly indebted to the plaintiffs in the sum of 500*l.* of lawful money of Great Britain, for principal monies due upon a bill of exchange, drawn by the said *P. W. P.* upon one *R. E.*, Esq., and payable to the order of the said plaintiffs ; and which said bill of exchange became due and payable at a day now past, and which said bill has been refused acceptance and payment by the said *R. E.*, Esq., although presented to him on the day when it became due, and the same has been duly protested for such non-payment ; and the said *Philip William Petre* has had notice thereof, and the amount of the said bill of exchange still remains due and unpaid."

A rule was thereupon obtained on the 14th November, in this term, calling upon the plaintiffs to shew cause why the defendant should not be discharged out of custody ; against which,

1. An affidavit to hold to bail, which states that the defendant is indebted to the plaintiff in 500*l.* for principal monies due upon a bill of exchange, without stating the sum for which the bill was drawn, is bad.

2. An application to set aside process for a defect in the affidavit to hold to bail must be made within a reasonable time. Nineteen days from the time of the arrest was held an unreasonable time.

*W. H. Watson* now shewed cause. There are two answers to this application ; first, the defendant is out of time. The writ was issued on the 26th October, and the defendant was detained on the same day. The rule in all the Courts is, that no application to set aside process for

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irregularity shall be allowed, unless made within a *reasonable* time, nor if the party applying has taken a fresh step after knowledge of the irregularity (*a*). At all events the defendant ought to have put in bail to the action on the 2nd November, and his motion ought to have been made before time for putting in bail had expired. [*Patteson J.* Should not some step be taken by the defendant to waive the irregularity?] In *Tucker v. Colegate* (*b*) there had been a rule to return the writ, which was an act to which the defendant was no party; but the rule, as above stated, was laid down by *Bayley J.*, and it is confirmed by *Fynn v. Kemp* (*c*) and *Firley v. Rallett* (*d*). *Sharpe v. Johnson* (*e*) will be cited on the other side; but that proceeded on the ground that the objection made to the affidavit shewed it to be altogether void, and not merely irregular, being made before an incompetent authority. But second, there is no irregularity in the affidavit; for it pursues the form given in *Tidd* (*f*). It is true that two cases in the Exchequer, *Brooke v. Colman* (*g*), and *Westmacott v. Cook* (*h*), decide that it is necessary to state the amount for which the bill is drawn; but the reason given for that is, if the sum is stated generally, part may be due for principle, and part for interest, for which an arrest cannot be made. But here there is no ambiguity, as the affidavit states the 500*l.* to be due for principal. In *Molyneux v. Dorman* (*i*), *Parke B.* said, "The affidavit ought to state the amount of the bill, for part of the 30*l.* (the sum sworn to) may have been for interest." But in this case there could not be that ambiguity.

*Bagley* contra. It is submitted, that the rule as to the time in which application should be made is not construed so strictly in the case of a prisoner. The affidavit is clearly

(*a*) R. Hil. 2 W. 4, 33.

(*b*) 2 C. & J. 489; S. C. 1 Dowl. P. C. 574.

(*c*) 2 Dowl. P. C. 620.

(*d*) 2 Dowl. P. C. 308.

(*e*) 4 Dowl. P. C. 324.

(*f*) *Tidd's Forms*, p. 96, 4th ed.; but see *Tidd's Forms*, last ed. 79.

(*g*) 1 Cr. & Mee. 621; S. C. 2 Dowl. P. C. 7.

(*h*) 2 Dowl. P. C. 519.

(*i*) 3 Dowl. P. C. 662.

bad. (It was also suggested that the case had been before *Littledale J.* at chambers.)

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Lord DENMAN C. J.—If you are not out of time, the affidavit is without doubt bad. A party making an arrest ought not to vary from the terms prescribed by the Courts. I do not know what the plaintiffs may mean by principal monies. But we will speak to my brother *Littledale* as to what occurred before him on the other point.

Lord DENMAN C. J., on the following day, stated that the Court were of opinion that the defendant was too late in his application.

Rule discharged.

The KING v. JOHN PRITCHARD EVE and SOPHIA  
SYLVESTER PARLBY.

Thursday,  
Nov. 24th.

IN Trinity Term last, *Wightman* had obtained a rule for a criminal information against the defendants, who were the printers and proprietors of the *Satirist Newspaper*, for printing and publishing the following libel upon *Simon Digby, Esq.* :—

“*Simon*, but more commonly known as *King Digby*, from his skill in palming the cards at *ecarté*, and who long enjoyed an unenviable notoriety among the legs at the club at Brighton, is now living in obscurity in Devonshire. He has been, however, recently in town, and was seen at Epsom during the races, sharply upon the look-out, it was presumed, for flats.”

Cause was shown in the same term by *Thesiger*, upon the affidavit of a person describing himself as “*Thomas Shepard*, of Frederick Street, Hampstead Road, in the county of Middlesex, gentleman,” who deposed, that about four years ago he was introduced, at Brighton, to Mr. *Digby*, who,

A rule nisi for a criminal information for a libel was discharged on an affidavit made by a person who swore to the truth of the libel. This person was indicted for perjury, the bill was found, and he absconded. It appeared from the affidavits of several persons, that the former affidavit was entirely untrue. The Court, under these circumstances, granted

ed another rule nisi for a criminal information, and made it absolute.



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deponent said, was commonly known by the name of *King Digby*; that he became intimately acquainted with him, and that Mr. *Digby* afterwards dined with him at the deponent's then residence in Shaftesbury Terrace, Pimlico; that Mr. *Digby*, after dinner, proposed cards; that they began playing at *ecarté*, and Mr. *Digby* won from 80*l.* to 85*l.*, upon which deponent, being surprised, watched his movements and detected him "slipping" or "palming" the king for the purpose of fraud; that deponent seized his wrist, on which he became alarmed, returned the money, and acknowledged that he had palmed the king.

On this affidavit being read, the Court discharged the rule without costs.

Sir *J. Campbell A. G.* (with whom were *Wightman* and *J. W. Smith*), in this term renewed the application for a criminal information against the above defendants, upon affidavits stating that *Shepard* was a person of infamous character and connected with gaming-houses; that it had been ascertained since the former rule was discharged, that he was about to be examined as a witness at Doctors' Commons, in a cause there, that Mr. *Digby* had taken the opportunity of confronting him at the door of the examiner's office, in presence of a witness; that *Shepard*, though then particularly addressed by Mr. *Digby*, had disclaimed all knowledge of him; that he had afterwards been examined on cross interrogatories as to the particulars of his evidence in the King's Bench; that he had in his answers contradicted his affidavit in every particular, denying that he had ever known Mr. *Digby*, or ever made any affidavit on the rule for the criminal information. His identity with the person who made that affidavit was, however, established beyond question by his handwriting at the foot of the affidavit and depositions, and also by the affidavits of two witnesses. The affidavits in support of the application further stated, that Mr. *Digby* had preferred a bill of indictment at the Central Criminal Court against *Shepard*, for perjury;

that the grand jury had returned it a true bill ; that a bench warrant was thereupon issued and put into the hands of a Bow Street officer, who however could not succeed in arresting *Shepard*, who had fled England and was still upon the continent. There was also an affidavit of Mr. *Digby*, denying the charges and imputations contained in that of *Shepard* in every particular, and deposing that he had never used unfair play at any game, or on any occasion whatever. There were also affidavits of a number of noblemen and gentlemen, attesting their belief and confidence in Mr. *Digby's* honour and integrity. Lastly, there was the affidavit of a Mr. *Begbie*, stating that the affidavit of *Shepard* was in the handwriting of a person connected with the Satirist, and that *Shepard* had, as he believed, formerly lived in the employ of another person connected with that paper.

The Court granted a rule nisi, and Lord *Denman* C. J. said, that the last affidavit, although extremely proper, was unnecessary ; that the Court having been induced to discharge the rule in consequence of *Shepard's* affidavit, it was now the duty of the Court to place Mr. *Digby* in statu quo.

On behalf of *Parlby* an affidavit was filed, denying that *Shepard* had lived, as deposed by *Begbie*, in the service of any individual connected with the Satirist, and denying, also, any collusion between *Shepard* and the managers of that paper.

*Thesiger* and *Kelly* now showed cause against the rule nisi. The Court will not entertain a renewed application on affidavits contradictory of the facts previously before the Court. If the Court refuse the renewed application, no great injury will be done, as the applicant may proceed by indictment. The affidavit of Mr. *Digby* was used on the former occasion ; the Court ought not to assume on *Digby's* affidavit that *Shepard* swore falsely.

*R. V. Richards*, on behalf of *Eve*, read an affidavit stat:-

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ing that he had, long before the publication of the libel, ceased to be the printer of the *Satirist Newspaper*.

Sir *J. Campbell* A. G. (with whom were *Wightman* and *J. W. Smith*) in support of the rule, was stopped by the court.

LORD DENMAN C. J.—The Court is extremely jealous of doing any thing on the suggestion that the former affidavit is untrue. The circumstances of this case are, however, so peculiar, that we do not feel that the making of this rule absolute would be laying down an improper rule or establishing an inconvenient precedent. It is unlikely that any future case will resemble this. Here *Shepard* was not only contradicted out of his own mouth as to his pretended knowledge of *Digby*, but he has avoided the trial of an indictment for perjury, which has been preferred against him. Under all these special circumstances, we think that the rule ought to be made absolute.

PATTESON J. and WILLIAMS J. concurred.

Rule absolute.

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CROSS v. METCALFE.

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Where a verdict was taken for the plaintiff, and all matters in difference in the cause were referred to an arbitrator, who certified, that for the justice of the case the record ought to be amended by allowing the plaintiff to substitute a replication, putting all the circumstances averred in the plea in issue; the Court held that they had no power to direct such an amendment.

*J. ADDISON* had obtained a rule, calling upon the defendant to shew cause why the record should not be amended in this cause, according to the certificate of the arbitrator.

The cause came on for trial at the last spring assizes for Yorkshire, *cor.* Lord *Denman* C. J., when a verdict for the plaintiff was taken by consent, and all matters in difference in the cause were referred to a gentleman at the bar.

The arbitrator made the following certificate:—

“As the arbitrator to whom this cause stands referred, after hearing all the evidence tendered by both parties thereon and the arguments of counsel, I certify respectfully

that they had no power to direct such an amendment.

to the Court that I am of opinion that it will be agreeable to the justice of the case to allow the plaintiff to amend the replication to the last plea, by substituting for the present a replication *de injuriâ*, or other replication putting in issue all the allegations in that plea, upon payment of the ordinary costs of the amendment and applications for leave to amend, if such an amendment can be ordered to be made in the present stage of the cause."

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*W. H. Watson* now shewed cause. Such a certificate is wholly unprecedented. The Court has no power to direct an amendment of this kind to be made after verdict has been taken. The acts of parliament (*a*) giving judges *à nisi prius* power to amend the record, are confined to cases of variance, and do not authorize any substitution of pleadings. The common law power of amendment only exists while the proceedings are in paper. If, on the other hand, the motion is made on the principle which directs this Court in awarding a repleader, it must also fail, as a repleader is never granted to him who makes the first default (*b*).

*J. Addison* contra. The question is, whether the Court has power to amend or not; for if it has, that power ought to be exercised, as the certificate of the arbitrator shews that justice will not be done without it. It is submitted the Court has the power. In 1 *Tidd's Pr.* (*c*), it is said, "Notwithstanding the general rule which prohibits amendments not authorized by the above statutes (of jeofails), after the proceedings are entered on record, the Courts, we have seen, have in particular instances permitted the plaintiff to amend his declaration or replication, and the defendant to amend his plea, in cases where there has been nothing to amend by, after issue joined, and after the proceedings have been entered upon record, and even after a trial has been

(*a*) 9 *Geo.* 4, c. 15; 3 & 4 *Will.* 2 *Wms. Saund.* 319 c, n. (6).  
 4, c. 42. (c) 9th ed. 713.

(*b*) See 2 *Tidd's Pr.* 9th ed. 921;

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had thereupon." In *Richardson v. Mellish* (a), after error had been brought in the King's Bench, an application was made to the Court of Common Pleas, to amend the verdict, and the amendment was made, and a similar amendment was made in the record in error (b).

So, in an action of trover against fifteen defendants, and a conversion alleged by fourteen only, amendment was allowed after error brought, *Smith v. Fuller* (c); and in *Tite v. Bishop of Worcester* (d), an amendment, by the insertion of a defendant's name, was allowed after verdict. So on demurrers, where the record is supposed to be made up, the Court frequently allows amendments on material points. The Court therefore has the power to order such an amendment. In *Hooper v. Mantle* (e) the plaintiff was allowed to amend his declaration, after a new trial had been obtained, on the ground of a variance.

By the COURT (f).—None of the cases apply to an amendment like the one now sought for, which is a substitution of a totally different issue to that raised by the parties. The verdict here is taken by consent; and it is only on the verdict that the arbitrator has any power. What authority can this Court have to substitute different matters for those which were agreed to be referred?

Rule discharged (g).

(a) 3 Bing. 334.

(b) 7 B. & C. 819.

(c) 1 Ld. Raym. 116.

(d) 1 Ld. Raym. 94.

(e) 13 Price, 695, 736.

(f) Lord Denman C. J., *Patterson J. and Williams J. Coleridge J.* was sitting in the Bail Court.

(g) See *Pearce v. Cameron*, 1 M. & S. 675.



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The KING v. Inhabitants of ABERGELE.

*HUMFREY* had obtained a rule, calling upon the defendants to shew cause why the writ of certiorari for removing an order of removal from the Denbighshire quarter sessions should not be quashed, and the recognizance of the defendants discharged. It appeared that the order of sessions was made on the 7th April, 1836, the sessions having commenced on the 5th April. An application was made at the chambers of Lord *Denman* C.J. on the 3d October, for a writ of certiorari; but his lordship being out of town, the application was forwarded to him by his clerk, and the fiat was received back in London on the 8th October. The notice of application for a certiorari, given to two of the justices pursuant to the statute 13 *Geo. 2*, c. 18, s. 5 (a), was signed by *A.* and *B.*, attorneys, on behalf of

1. Where a parish prosecutes a certiorari to remove an order of sessions, the recognizance required by the 3 *Geo. 2*, c. 19, s. 2, to prosecute with effect, must be entered into by some one inhabitant on behalf of the rest of the parish, with two sureties.

2. When the sessions commenced on 5th April, and an order of sessions was made on the 7th April, an application made at a judge's chambers on 3d October, and allowed on or before the 7th October, for a certiorari to remove an order of removal, is within sufficient time.

3. If a certiorari has been applied for in time, but the allowance of it is quashed for a defect in the recognizance,

(a) Sect. 5. And for the better preventing vexatious delays and expense, occasioned by the suing forth of writs of certiorari for the removal of convictions, judgments, orders, and other proceedings before justices of the peace; be it further enacted, by the authority aforesaid, that from and after the 24th day of June, which shall be in the year of our Lord 1740, no writ of certiorari shall be granted, issued forth or allowed, to remove any conviction, judgment, order, or other proceedings, had or made by or before any justice or justices of the peace of any county, city, borough, town corporate, or liberty, or the respective general or quarter sessions thereof, unless

such certiorari be moved or applied for within six calendar months next after such conviction, judgment, order, or other proceedings, shall be so had or made, and unless it be duly proved upon oath that the said party or parties suing forth the same, hath or have given six days' notice thereof, in writing, to the justice or justices, or to two of them (if so many there be), by and before whom such conviction, judgment, order, or other proceedings, shall be so had or made, to the end that such justice or justices, or the parties therein concerned, may shew cause, if he or they shall so think fit, against the issuing or granting such certiorari.

the Court, under circumstances, will send the writ down again to be properly allowed.

4. If a notice to the justices of an application about to be made for a certiorari to remove an order of sessions, pursuant to 13 *Geo. 2*, c. 18, s. 5, be signed by "*A.* and *B.*, attorneys, on behalf of the appellants," it is sufficient, *semble*.

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the appellants; and the recognizance entered into, in pursuance of 5 *Geo. 2*, c. 19, s. 2, was made by C. and D., two of the inhabitants of the parish.

First point :  
Notice to justices of an application for a certiorari may be signed by an attorney on behalf of parish.

*J. Jervis* now shewed cause. First, where the whole parish are appellants, in practice the notice to the justices, of an application to be made for a certiorari, under 13 *Geo. 2*, c. 18, s. 5, is always signed by an attorney on behalf of the parish; and although in *The King v. The Justices of Lancashire* (a), it was held that a notice, signed by "*Lace, Miller and Lace, attorneys*," was not sufficient, it was admitted in argument, and also, in *The King v. The Justices of Cambridgeshire* (b), that if the notice had stated for whom the parties were attorneys, it would have been sufficient.

Second point :  
Certiorari applied for in time.

The next point is, that the writ was not applied for within the six months required by 13 *Geo. 2*, c. 18; but as the order was made on the 7th April, and application was made to the Lord Chief Justice on the 3d October, and the writ received in the country on the 8th October, it must have been granted before the 7th October, which is in time.

Third point :  
Recognizance perfected according to 5 *Geo. 2*, c. 19.

Lastly, it is said the recognizance is not perfected according to the 5 *Geo. 2*, c. 19, s. 2, because the prosecutor himself has not entered into it. *The King v. Boughey* (c) is *primâ facie* an authority for that position; but that was an indictment against an *individual*; and although no distinct authority is to be found in the books on the subject, the practice always has been, in parish appeals, for two of the inhabitants only to enter into the recognizance.

Second point.

*Humfrey* contra. Supposing the fiat for the certiorari to have been granted on the 7th October, the sessions having commenced on the 5th April, must date from that day, the six months therefore had expired. [Lord Denman C. J. If you make the point of the sessions being considered as held on one day, you ought to give the other side


(a) 4 B. & Ald. 289.

(b) 3 B. & Ad. 887.

(c) 4 T. R. 281.

the benefit of considering the certiorari to have been granted on the first day on which it was applied for, namely, the 3d October.]

As to the recognizance, it is submitted, that the churchwardens and officers of the parish were the proper parties to enter into the recognizance. It is admitted that the practice has been otherwise, but that is of no weight if it is contrary to the act of parliament, for till *The King v. Boughey(a)*, the practice had been to require only two sureties in any case. [Lord Denman C. J. By a manuscript note, it appears that Lord Kenyon thought, in the case of *The King v. Boughey*, that in the case of a parish appeal, two of the inhabitants might enter into the recognizance(b).] That may be the origin of the practice, but the 5 Geo. 2, c. 19, s. 2, makes a clear distinction between the prosecutor and the sureties, and directs that the former shall enter into a recognizance with sufficient sureties. If the parish officers are the parties to enter into the recognizance, they have not done so here. Parke B. in *The King v. The Justices of Cambridgeshire(c)* said, the parish officers suing out a certiorari were bound to enter into the recognizance. And it is clear that a parish is not represented by any two of the inhabitants.

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 Third point.

Lord DENMAN C. J.—I am rather inclined to think no Third point. very rigid sense is to be attributed to the words requiring the prosecutor to enter into a recognizance with sufficient sureties, and that Lord Kenyon took the common-sense

(a) 4 T. R. 281.

(b) The reporters have been favoured with the following note of what fell from Lord Kenyon, in the above case, by P. Dealtry, Esq. of the Crown Office:—"It appears from a manuscript note of this case, taken by the late Mr. Dealtry, Lord Kenyon said, 'in case of a parish, one or two of the inhabitants might enter into the recogni-

zance, on behalf of the rest, as on an indictment they plead in the name of the whole;' and the practice has uniformly been, since the determination of that case, for a recognizance to remove orders of sessions, on behalf of a parish, to be entered into by A. and B., two of the inhabitants of the parish only."

(c) 3 B. & Ad. 387.



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view of it, in considering that in the case of a parish, it was sufficient for the recognizance to be given by two of the inhabitants; but as the distinction is made in the act, the rest of the Court think it is imperative upon us, to require the words of the act to be complied with. I think Lord *Kenyon* may have meant that one person might enter into the recognizance to prosecute on the behalf of the parish, and then two sureties to be added, as in other cases. We think, however, the rule may be moulded, and as the certiorari has been applied for in proper time, it may go down again to the sessions, to be allowed properly.

*Humfrey* contended, that as the allowance of the writ was bad, he was entitled to have it quashed, and that a new writ of certiorari could not issue as the time had expired (a).

PATTESON J.—The Court may treat it as a writ not acted upon, in which case it will be allowed in due course. It would not vitiate a writ of certiorari, that having been obtained, if it is not produced for a sessions or two.

WILLIAMS J. (b) concurred.

The following rule was afterwards drawn up:

“It is ordered, that the allowance of the writ of certiorari, issued in this prosecution, be quashed, and the recognizance of the defendants discharged. And it is further ordered, that the return to the said writ of certiorari be enlarged, and the said writ of certiorari, and the orders returned therewith, sent back to the sessions, in order that the said writ may be duly allowed, after the said defendants shall have entered into a recognizance, by one of them the said defendants, on behalf of himself and the other inhabitants, prosecuting the said writ of certiorari, with sufficient sureties, in the sum of 50*l.*, pursuant to the provisions of the statute in that case made and provided.

“By the Court.”

(a) See *Rex v. Newton*, Burr. S. C. 157.

(b) *Coleridge J.* was sitting in

the Bail Court for *Littledale J.*, who was sitting at Guildhall.

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The KING v. The Mayor and Assessors of HYTHE.

SIR W. W. Follett applied for a rule nisi for a mandamus to the mayor and assessors of the town and port of Hythe, to insert the names of *William Ashdown* and fourteen others, on the burgess roll for that borough. It appeared by an affidavit of one of the parties, that the objection made to the retention of their names on the burgess lists, was the non-payment of the shilling required by the Reform Act (a), but that in every other respect all the parties were duly qualified, according to the 9th section of the Municipal Corporation Act (b). At the revision of the burgess lists, before the mayor and assessors of Hythe, on the 14th and 15th October, 1836, the non-payment of the shilling was considered a fatal objection by one of the assessors and the mayor, who accordingly expunged the names. The other assessor thought it was not a valid objection.

Where the names of certain burgesses, duly qualified in other respects, were objected to, and expunged from the burgess lists, by the mayor and assessors, on revision, on account of the non-payment of the shilling required by 2 Will. 4, c. 45, s. 56, the Court of K. B. considered that they had not the power to grant a mandamus to insert the names.

Sir W. W. Follett in support of the application. As a quo warranto would issue, if the mayor put names improperly on the roll, so a mandamus ought to go, if the mayor refuse to insert names of parties duly qualified. Unless the non-payment of the shilling is a fatal objection, these parties being duly qualified, according to the 9th section of the Municipal Corporation Act (b), have a right to be inserted on the roll, and, like parties with an inchoate right under the old corporation system (c), are entitled to the writ of mandamus. [Coleridge J. By the 22d section, it appears that the mayor is to deliver the burgess lists to the town clerk of the borough, after they are revised and signed, and on the 8th of November the new mayor is to be elected,—to whom then should the mandamus go?] To the late mayor and assessors. [Patteson J. The mayor is directed by the act to write his initials against the names of any one struck out or

(a) 2 Will. 4, c. 45, s. 56.

(b) 5 & 6 Will. 4, c. 76.

(c) See Com. Dig. Mandamus

(A); *Townsend's case*, 1 Lev. 91.

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inserted; but if the mandamus should go to the late mayor, what power could he have under that clause? It is a choice of difficulties, and the question is, whether when parties have an inchoate right, and there is no other remedy, the Court will not grant the writ, in order to have justice done. It is clear, that if the assessors, who are almost necessarily chosen by different parties, differ, then the mayor may always decide in favour of that party to which he himself belongs.

By the COURT (a).—We think we have no power to grant a writ of mandamus in this case.

Rule refused.

(a) Lord Denman C. J., Patteson J., Williams J. and Coleridge J.

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PEACOCK v. HARRIS.

A verdict was found for the plaintiff. A new trial was subsequently granted, on the ground that some evidence had been improperly received. The defendant then withdrew his plea, after the plaintiff had applied for a special jury, and suffered judgment by default, and the damages were assessed. The rule for a new trial was silent as to the costs of the first trial. Held, that by reason of the rule 64 Hil. T. 2 Will. 4, the plaintiff was not entitled to the costs of the first trial.

A RULE had been obtained in this case on the part of the defendant, calling upon the master to review his taxation of the costs, under the following circumstances;—

The plaintiff sued as the assignee of the estate and effects of *J. Jones*, an insolvent debtor, to recover a sum of money for work and labour done, and materials supplied by the insolvent to the defendant. At the Spring Assizes for 1835, for the county of Denbigh, a verdict passed for the plaintiff; the defendant subsequently obtained a rule nisi for a new trial, on the ground that evidence had been improperly received; and this rule was subsequently made absolute. Notice of trial for the ensuing assizes was given by the plaintiff; but the defendant withdrew his plea after the plaintiff had applied for a special jury, and suffered judgment by default, upon which a writ of inquiry issued, and the damages were assessed at the same sum as upon the former trial. On the taxation of the plaintiff's costs the Master allowed the expenses of the first trial on the

authority of *Jackson v. Hallam* (a). The rule for a new trial was silent as to the costs of the first trial.

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*Jervis* now shewed cause. The defendant, by his subsequent conduct, shews that he defended the action not having had a real ground of defence. He has put the plaintiff to unnecessary costs. In *Booth v. Ather-ton* (b), after the argument of a special case, the Court directed a new trial, because the case was insufficiently stated; the defendant, without going to trial again, gave the plaintiff a cognovit, and the Court held that the defendant was liable to pay the costs of the former trial. In *Jackson v. Hallam* (a) the plaintiff had a verdict. A new trial was granted, on the ground that the judge had misdirected the jury in point of law; but the rule for the new trial was silent as to costs. The defendant, without going to trial, gave the plaintiff a cognovit, and the Court held that the defendant was liable to pay the costs of the trial. Here the defendant has withdrawn his plea, and that is the same as executing a cognovit, since he has thereby acknowledged that he had no ground of defence to the action. [*Coleridge J.* referred to *Gray v. Cox* (c).] The practice has not been altered by the rule of Hilary term, 2 Will. 4. That rule applies where a second trial takes place, and was framed merely with a view to assimilate the practice of the several Courts, which before that rule was different where a new trial was granted (d), but which was uniform upon this point. In *Sweeting v. Halse* (e), where the verdict passed for the defendant, and a new trial was granted, on the plaintiff discontinuing the action, the Court granted the defendant the costs of the first trial.

*R. V. Richards*, in support of the rule. *Gray v. Cox* (c) and *Sweeting v. Halse* (e) have no application to this case.

(a) 2 B. &amp; Ald. 317.


(b) 6 T. R. 144.

(c) 8 D. &amp; R. 220; S. C. 5 B. &amp; C. 458.

(d) See *Loader v. Thomas*, 1 C.

&amp; J. 54, and 2 Tidd, 916, 9th ed.

(e) 9 B. &amp; C. 369.

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Before the late rule upon the subject, the granting of costs of the first trial was a mere matter of practice, and the practice of the Courts did not agree. By rule 64, Hilary Term, 2 *Will.* 4, if a new trial be granted without any mention of costs in the rule, the costs of the first trial shall not be allowed to the successful party, though he succeed on the second. In *Newberry v. Colvin* (a) it was laid down by *Littledale J.* that where a new trial is granted, and nothing is said about the costs of the first trial, they fall to the ground as a matter of course. *Porter v. Cooper* (b) also establishes the same rule.

Lord DENMAN C. J.—We clearly have no power to grant these costs.

PATTESON J., WILLIAMS J., and COLERIDGE J. concurred.

Rule absolute (c).

(a) 2 Dowl. P. C. 415.

(c) See *Seelly v. Powers*, 3 Dowl.

(b) 2 C. M. & R. 232.

P. C. 372.

*Tuesday,*  
*Nov. 25th.*

BASTARD v SMITH and others.

1. Two pleas to an action of trespass *quare clausum fregit*, the one justifying under a custom for all tinnerns to make trenches in lands, for conveying water for the better working of a stannary, and the other alleging the custom to be upon making compensation for the injury done, cannot be pleaded together, being within the rule of Hil. 4 *Will.* 4.

IN an action of trespass for breaking and entering thirty-six closes of land in the county of Devon, and cutting leats there, a rule had been obtained, calling upon the plaintiff to shew cause why the defendant should not be allowed to plead the several matters following; that is to say, first, justifying the trespasses under a custom for all stannerns and tinnerns in the stannaries of Devon to make treuches in any lands for conveying water to any stannary worked by them, for the better working of the same. Secondly, the like plea, but alleging the custom to be on making a reasonable compensation for the injuries done.

2. The rules of Hil. 4 *Will.* 4, made by virtue of 3 & 4 *Will.* 4, c. 42, are to be construed in the same manner as an act of parliament.

Sir *W. W. Follett* and *M. Smith* now shewed cause. The Court has no power to grant this rule. By the general rules of Hilary term, 4 *Will. 4*, made pursuant to the statute 3 & 4 *Will. 4*, c. 42, several counts are not to be allowed, unless a distinct subject-matter of complaint is intended to be established in respect of each; nor are several pleas to be allowed, unless a distinct ground of answer or defence is intended to be established in respect of each. One example given is, "pleas of right of common at all times of the year, and of such right at particular times, or in a qualified manner, are not to be allowed." That is precisely the case here. A custom, first, without qualification, and secondly, with a qualification, is sought to be pleaded. The rules which have been referred to have the force and effect of an act of parliament, and exclude the Court from exercising any discretion. The 3 & 4 *Will. 4*, c. 42, enacts, that any rule laid before both houses of parliament is, after a certain time, to be binding and conclusive on the Courts of common law, and of the like force and effect as if the provisions contained in it had been expressly enacted by parliament. The rules are therefore as binding as an act of parliament. *Jenkins v. Treloar* (a) is an express authority to shew that pleas like these cannot be pleaded together. It was argued in that case, that where two distinct rights in point of law may accrue from the same facts, both may be pleaded; but the Court rejected that rule, and said, that to warrant two pleas, there must be distinct defences existing in point of fact. Here there is clearly only one subject-matter of defence in fact, since there can be only one custom overruling the district of the stannaries.

*Erle* in support of the rule. This is a claim under the stannary customs, which are considered as a sort of common law peculiar to the stannaries, and are not to be regarded as ordinary customs. There may be evidence applicable to

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(a) 1 *Mee. & W.* 16.

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each plea. The customs of the stannaries are supposed to have their origin in royal grant, and it is not impossible that there may have been two grants; the one granting the right without qualification, and the other granting it upon condition of making reparation for the injury done. [Coleridge J. These are customs. You must contend that there are two co-existing customs, at variance with each other, overriding the same district.] The defendant is anxious to avoid the expense of two trials. The action is brought under the direction of the Court of Chancery, to have the right decided.

Lord DENMAN C. J.—This is expressly within the rule. We have not, therefore, the power to grant the application, even if we were so inclined.

PATTESON J., WILLIAMS J., and COLERIDGE J. concurred.

Rule discharged (a).

(a) If two customs in a district are not inconsistent with each other, *semble*, they may co-exist. See the observations of Buller J. in *Fitch v. Rawling*, 2 H. Bl. 393-7.

Friday,  
 Nov. 25th.

OHRLY v DUNBAR.

Where sixty actions were pending on a policy on a ship which had been insured to a very large amount, and a consolidation rule had been entered into in which plaintiff and

THIS was an action on a policy of insurance on a steam ship, called the *Pylades*, for a total loss. The case was tried at the sittings after last term, before Lord Denman C. J., when a verdict was found for the plaintiff.

A rule *nisi* for a new trial had been obtained, on the ground that the verdict found for the plaintiff was against the weight of evidence. In this term, Sir W. the other defendants agreed to be bound by the decision in this action, the plaintiff having recovered a verdict on which a rule *nisi* had been obtained in the King's Bench for a new trial, the Court refused to order the defendant to pay the amount recovered against him into Court, or to invest the same, upon the ground that the great arrear of causes in the new trial paper would prevent the rule *nisi* coming on for argument for a long time, and that the losses and risk of the plaintiff were thereby greatly increased.

*W. Follett* obtained a rule, calling upon the defendant to shew cause why he should not pay into Court the loss on the *Pylades*, in the affidavit mentioned, or invest the same, according to the direction of this Court, or why the rule *nisi* for a new trial should not be discharged. The affidavit on which this rule was obtained stated the following circumstances:—

Six several policies of insurance were effected on the vessel, amounting to 27,200*l.* on behalf of the Netherlands Steam Boat Company. The sum insured by the defendant was 300*l.*; 7000*l.* was underwritten by the Indemnity Mutual Insurance Company, 5000*l.* by the Royal Exchange Insurance Company, 2000*l.* by the London Assurance Company, and 2000*l.* by the Alliance Company, and the remainder by several underwriters at Lloyd's Coffee House. The vessel was lost on the 2nd January, 1835. Notice of abandonment was given on the 9th January, 1835. Actions were commenced against the several underwriters, and a consolidation rule was entered into, whereby it was ordered, upon the submission of the plaintiff and defendants last named in the order (being all the defendants except the defendant to this action), that they should be bound and concluded by the verdict to be given in the present action, provided the same were to the satisfaction of the judge before whom it should be tried, and that all further proceedings in all the actions except the present be stayed. The present action was commenced on the 28th of April, 1835. At the trial, the defendant gave evidence on two pleas: the one that the ship was not seaworthy; the other, that before and at the time of making the insurance, the plaintiff falsely represented to the defendant that the vessel was quite new, and that the policy was made upon the faith of such false representations, whereas in truth and in fact, the said vessel was not, at the time of making such representation, quite new. The affidavit further stated that a rule *nisi* for a new trial had been obtained, and that, from the great arrear of causes in the new trial paper, the rule

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could not come on for argument for a very long period of time. That the parties interested in the vessel had already sustained a severe loss from the loss of interest on the sum insured, and that two of the underwriters were lately dead. Against this rule,

Sir *J. Campbell* A.G. and *Maule* now shewed cause. It is presumed that the plaintiff relies on some peculiar circumstances to take this case out of the general rule. The policy is for 27,200*l.*; 1200*l.* only is subscribed at Lloyd's Coffee House; the remainder is subscribed by the large offices. There can be, therefore, little inconvenience to the plaintiff, from the mortality of the underwriters. The jury, on the second trial, may or may not give interest. This is an application to the Court to give interest at all events, and to withdraw that question from the consideration of the jury. There is a consolidation rule, but the plaintiff may, notwithstanding, proceed in another cause. It was formerly supposed that both parties were bound (*a*) by the consolidation rule, but this Court has held the contrary (*b*).

Sir *W. W. Follett* and *Alexander* contrà. By the consolidation rule in this case, both parties are bound. It is said that the jury may give interest; but this is not a case in which, by the recent statute, interest can be given. The underwriters are receiving interest all this time. The circumstances of the case are peculiar. The large amount of the insurance, and there being sixty actions pending against different underwriters, two of whom are already dead, with the probability of many others dying, becoming insolvent, or bankrupt, distinguish this from an ordinary case. If a new trial should be refused, and this rule be not granted, the plaintiffs, who are foreigners, will have lost interest to the amount of 1500*l.* As to the insurances at the large offices, the plaintiff is willing that that part of the rule, as to the sums there insured, should be discharged.

(*a*) *Doyle v. Douglas*, 4 B. & Ad. 544.

(*b*) *Doyle v. Stewart*, 4 N. & M. 873.

LORD DENMAN C.J.—The remarkable circumstances of the case induced the Court to grant the rule. We have now heard the matter discussed, and we are all decidedly of opinion that we should lead to greater delay if we granted this application. I am decidedly of opinion, that we ought to have no reference to what may be the state of the business in the Court.

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PATTESON J.—There is no delay arising from the consolidation rule. If all the sixty actions had been tried, there would have been sixty rules for new trials.

WILLIAMS J. and COLERIDGE J. concurred.

Rule discharged.

LORD BOLTON v. OTHWELL TOMLIN and two others,  
Executors of JOHN TOMLIN.

Friday,  
Nov. 25th.

**ASSUMPSIT.** The declaration stated that *John Tomlin* became and was tenant to the plaintiff of a certain farm in the county of York for one year, and so from year to year, until the plaintiff, or the said *John Tomlin*, should give to the other due notice to quit, at the sum of 75*4*l., to be paid yearly, for the occupation of the said farm, and also upon certain terms and conditions. A great variety of special conditions respecting the mode of cultivating the farm were set out. The declaration then stated the promise to read from a printed paper the terms of letting. The testator was present and assented to those terms, agreeing to succeed his father at Lady-day, but no writing was signed. He did then enter and continued tenant till his death, since which the defendants (his executors) occupied and paid rent. At the foot of the printed paper of terms was written a memorandum, not signed by either party, but by the attorney of the plaintiff, who was present at the time of the letting. This memorandum commenced in the following terms: "*A. B.*, as agent of the plaintiff, agreed to let, and *C. D.* agreed to take," and went on to state the farm, rent, and when payable; that the term was for one year certain, from Lady-day next, and so from year to year, until a due notice to quit was given. It was held that this agreement, followed by entry and payment of rent, created a tenancy, upon the terms contained in the printed paper and memorandum, and that they might be referred to by the attorney (the witness), as shewing what the terms of the demise were.

In December, 1819, the testator's father was tenant of a farm belonging to the plaintiff till the following Lady-day. The plaintiff's steward, in the month of December, proposed to let the farm, and

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pay the rent and cultivate the farm, upon the conditions ; the death of *Tomlin*, his will, and the probate of it ; that the defendants entered upon the land ; that a sum of money was due for rent ; and then averred ten separate breaches of the above conditions in the time of the executors. Pleas : 1st, non assumpsit by *John Tomlin* ; 2nd, performance ; 3d, a discharge from payment of the rent, and two other pleas, which it is not necessary to mention. At the trial at the York Lent Assizes for 1835, before *Parke B.*, it appeared that *Lord Bolton* had a great many farms in the neighbourhood of the farm in question, and that the mode in which the steward let the farm was as follows. If any one applied to take a farm, a set of printed rules was placed in his hands, and if he was satisfied with the conditions and the rent of the farm, it was let to him. A short time afterwards, a memorandum was made at the end of the printed rules, mentioning the amount of the rent, the number of acres of the farm, and other particulars. The rules were read over to the tenants as a body, and the memorandum was read over to each particular tenant, and *Lord Bolton's* solicitor then signed the memorandum. The memorandum at the foot of the rules in the present case was as follows : " Memorandum. *W. S.* of \_\_\_\_\_, &c. (*Lord Bolton's* steward) as agent for and on behalf of *Lord Bolton*, agreed to let to *John Tomlin*, and the said *John Tomlin* agreed to take of the said *W. S.* all that farm, &c. for the term of one year, and so from year to year, until one of the said parties shall give the other notice to quit, at and under the yearly rent of 750*l.*, to be paid in equal half-yearly payments ; that is to say, on the 25th March and on the 29th September in each year, subject to the within printed regulations and conditions, in the presence of me *Lupton Topham*," (*Lord Bolton's* solicitor.) The rules and this memorandum were read over in the presence of the plaintiff, according to the usual custom, as above stated. This was on the 16th of December, 1819. At that time the farm was in the occupation of *John Tomlin's* father, who continued to occupy until

Lady-day following. *John Tomlin* then entered and occupied until his death, which happened on 29th June, 1821, he in the meantime having paid the year's rent up to the 25th March, 1821. Upon his death, his executors, the defendants, entered and occupied without any fresh agreement, during the time the alleged causes of action accrued. It was proved that on one occasion they had applied to the steward for permission to depart from some of the terms mentioned in the rules. These rules and the memorandum (which had been stamped with a lease stamp), were received in evidence, and read to the jury. A verdict passed for the plaintiff, subject to the following objections, on which *Cresswell* subsequently, pursuant to leave given, obtained a rule nisi for a nonsuit, viz. that the agreement did not operate as a demise; and, secondly, that it was void as an agreement, not being to be performed within a year, and not being signed by *John Tomlin*, who must therefore be taken to have held, not under the terms of the rules, but only under such terms as were incident to the relation of landlord and tenant.

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*Alexander* and *J. Addison* shewed cause on a former day (Nov. 21st) in this term (a). This was a parol lease. By the 1st section of the Statute of Frauds, all leases, not put in writing and signed by the parties making the same, shall have the force of leases or estates at will. But this is removed from the operation of that clause by the 2nd section, which in terms exempts leases not exceeding three years. It was said at the trial that this instrument could not be a lease, inasmuch as a present interest did not pass; but that it was a mere agreement for a lease to commence at a future day. But *Ryley v. Hicks* (b) answers that objection. There it was held that a demise by parol on 24th February, of a cellar, from Lady-day then next, for a quarter of a year, and so from quarter to quarter, so long as both parties should please, at 6l. a quarter, was good. In *Selwyn's Nisi Prius* (c), *Ryley*

First point:  
 The agreement  
 was a demise  
 for less than  
 three years.

(a) Before Lord Denman C. J.,  
*Patteson J.*, *Williams J.*, and *Cole-  
 ridge J.*

(b) 1 Stra. 651.

(c) P. 831, 8th edit.

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v. *Hicks* is cited, with the observation, that "in *Inman v. Stamp*, B. R. Trin. 55 Geo. 3, *Dampier J.* said, that the practice had been with the foregoing case of *Ryley v. Hicks*, although he rather inclined to think that the 2nd section of this statute, taken with section 4, was confined to leases executed by possession, on which two-thirds of the improved rent were reserved." There is therefore, on the one hand, a decision of this Court with a corresponding practice, and on the other, the opinion of *Dampier J.* In the note to *Took v. Glascock (a)*, it is also laid down, that a lease, although to take effect at a future day, vests a present interest.

Second point:  
The agreement  
was not a con-  
tract within  
the 4th section  
of the Statute  
of Frauds.

But it is argued that this is an agreement for a lease, and not to be performed within a year, and that the 4th section of the Statute of Frauds requires that such an agreement should be in writing, and signed by the party to be charged therewith; and when the rule was moved for, *Bracegirdle v. Heald (b)* was cited. In that case it was held, that a contract for a year's service, to commence at a subsequent day, being a contract not to be performed within the year, is within the fourth section of the Statute of Frauds, and must be in writing. That case is, however, distinguishable from the present. The contract here is a lease, not an agreement. There may be a parol letting for a term not exceeding three years. As soon as the party answered in the affirmative to the question, do you take on these terms? there was instantly a demise. It is not contended that the written instrument was itself a lease, but that it may be used to show the terms of the parol demise. In *The King v. The Inhabitants of St. Martin, Leicester (c)*, to prove a settlement by renting a tenement, a witness produced a book containing the entry of an agreement for a present demise of a house at 11*l.* per annum. He further stated, that he let the house as agent to his father, who was present, and that the terms were reduced to writing, to prevent mistake, and signed by the wife of the pauper, the husband not being present, but that the entry was not signed by the witness or his father,

Third point:  
The rules  
and memoran-  
dum did not  
constitute a  
lease, but may  
be referred to  
to shew the  
terms of the  
parol demise.

(a) 1 Wms. Saund. 250 f.

(b) 1 B. & A. 722.

(c) 4 N. & M. 202; S. C. 2 Ad.  
& Ell. 210.

nor did their names appear in any part. It was held that the entry itself was neither a lease nor an agreement for a lease, but that the witness might look at the entry to refresh his memory. So, in the present case, the written instrument is neither a lease nor an agreement for a lease; but it may be referred to by the witness as shewing what the terms of the letting were. *The King v. Inhabitants of Wrangle* (a) is in point for the present case. There the terms of an agreement for the hiring of a servant were, by the direction of the parties, written down by a third person, and the writing was read over to the parties, but not signed by them. The Court held, that parol evidence of the terms of the hiring was admissible. It is also contended by the other side, that this agreement, not being under seal, could not operate as a demise; because, at the time it was made, there was a subsisting demise. But this objection is untenable, inasmuch as the subsisting demise was for a shorter term; and at the end of that term there was an entry by *John Tomlin* under the new demise; *Bac. Ab.* title *Leases* (N.) But, supposing the agreement not to be a demise, and not to be binding as an executory agreement; yet, as *John Tomlin* and the executors successively entered, and occupied in pursuance of the agreement, they must be taken to have held under the terms of the agreement. They paid the rent mentioned in the memorandum, and by applying, as was proved, for permission to depart from some of its terms, they recognized its existence. *Doe v. Bell* (b) and *Richardson v. Gifford* (c).

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*Cresswell* and *Wightman* in support of the rule. The declaration is founded on an agreement, which is not to be performed within a year; and the written instrument containing the agreement, not being signed by the party to be charged therewith, was not admissible in evidence by reason of the 4th section of the Statute of Frauds. In *Rex v.*

(a) 4 N. & M. 375; 2 A. & E.  
514.

(c) 3 N. & M. 325; S. C. 1 A.  
& Ell. 52.

(b) 5 T.R. 471.

Second point.

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First and  
second points.

*Wrangle* (a), and in *Rex v. St. Martin's, Leicester* (b), it was held, that the witness might refer to the paper to refresh his memory. In the present case, the paper was read to the jury, and the witness did not refresh his memory with it. This was not a lease, as no present interest passed; *Doe d. Rawlings v. Walker* (c); and therefore is not within the exception in the 2nd section of the Statute of Frauds. If this is an agreement for a demise for a year, to commence from Lady-day, it was an agreement not to be performed within a year. It would appear from *Say v. Smith* (d) that a lease from year to year, is a lease for two years. It may be true that, by the entry of the testator, a tenancy was created; but the terms of the agreement cannot be imported into the contract, unless the agreement was in conformity with the 4th section of the statute. The terms of the agreement do not flow from the relation of landlord and tenant. [*Patteson J.* Do you contend, that there cannot be a parol demise for two years, on special terms?] If parties agree in respect to a demise for a year, to commence at a future period, the terms must be reduced to writing and signed by the party to be charged. In *Boydell v. Drummond* (e), it was held, that a written paper containing the terms of the contract, not signed by the party to be charged, could not be referred to; so here the memorandum and the printed rules, not being signed, could not be referred to as shewing the terms of the contract. The words of the Statute of Frauds are express. If, where there is no writing, the terms of the contract are implied in law, and there can be no danger of perjury; but there may be, if special terms are allowed to be engrafted on the contract implied by law. [*Patteson J.* According to your argument, in a tenancy from year to year to commence at a future period, no rent could be reserved. The action by the landlord must always be on a *quantum*

(a) 4 N. & M. 375; S. C. 2 A. & E. 514.

(b) 4 N. & M. 202; S. C. 2 A. & E. 210.

(c) 7 D. & R. 487; 5 B. & C. 111.

(d) Plowden, 268—273.

(e) 11 East, 142.

*meruit.*] The same objection might be urged to the decision in *Bracegirdle v. Heald* (a). *Inman v. Stamp* (b), is an authority in point. The written instrument could not be considered as a lease on the 16th of December. It is not therefore within the exception of the 2nd section; but being an agreement not to be performed within a year, it is within the 4th section of the Statute of Frauds.

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Lord DENMAN C. J., on this day delivered the judgment of the Court, as follows:—This was a special action of assumpsit for breach of the terms of a parol lease. The defendants were executors of the lessee. The facts were, that in the month of December, 1819, the testator's father was tenant of the premises till the following Lady-day. The plaintiff's attorney, in the month of December, proposed to let the plaintiff's farms at a meeting, and read from a printed paper the terms of letting. The testator was present, and assented to those terms, agreeing to succeed his father at Lady-day, but no writing was signed. He did then enter and continued tenant till his death; since which, the defendants (his executors) have occupied and paid rent. At the foot of the printed paper of terms was written a memorandum, not signed by either party, but by the attorney of the plaintiff. This memorandum commenced in the following terms:—"A. B., as agent of the plaintiff, agreed to let, and C. D. agreed to take," and went on to describe the farm, state the rent, and when it was payable,—that the term was for one year certain from Lady-day next, and so from year to year, until a due notice to quit should be given. The plaintiff had a verdict, with liberty to the defendant to move for a nonsuit. It is contended on behalf of the plaintiff, that the testator became tenant at all events on his entry at Lady-day, 1820, if not before, and that the memorandum might properly be adverted to for the purpose of shewing the terms of the tenancy, although not to shew any agreement to become

(a) 1 B. &amp; Ald. 722.

(b) 1 Stark. 18.



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Third point.

tenant. On the other hand, it is contended, that this was an agreement not to be performed within a year, and so required to be in writing, and signed, by the 4th section of the Statute of Frauds; and that although a tenancy from year to year may have been created, yet that the terms of it could be only such as result by law from the mere relation of landlord and tenant, there being no writing to satisfy the statute. Now assuming that what passed in the month of December did not amount to a demise, (see *Inman v. Stamp* (a), *Edge v. Strafford* (b),) and that whilst it remained an executory agreement, the performance of it could not be enforced; yet it by no means follows, that when an actual demise by parol took place, and which was valid under the second section of the statute, and a tenancy was actually created by entry and payment of rent, the terms of that tenancy may not be proved by parol. Leases not exceeding three years have always been considered as excepted, by the second section, from the operation of the first; and it seems absurd to say that a parol lease shall be good, and yet that it cannot contain any special stipulations or agreements. No authority is, or can be cited to shew that it may not. On the contrary, it has always been assumed, that a parol lease warranted by the second section may be as special in its terms as a written one, and we are of opinion that the law is so. But it is contended, that in this view of the case, the memorandum could only be used to refresh the memory of a witness; and perhaps that may be so. We cannot find that it was used substantially in any other manner; certainly it was not treated as being in itself a binding instrument; and whether in fact it was read by the officer of the Court, or by the witness, is immaterial, no objection on that ground having been taken at the trial. On these grounds we are of opinion, that the verdict is right, and that this rule to enter a nonsuit must be discharged.

Rule discharged.

(a) 1 Stark. 12.

(b) 1 Cr. & J. 391.

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DOE on the demise of CROSTHWAITE and another v.  
DIXON and another.

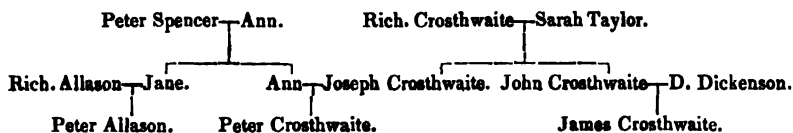
Friday,  
Nov. 25th.

**EJECTMENT** brought for land in the parish of Brigham, in Cumberland. At the trial before Lord *Abinger* at the Summer Assizes for the county of Cumberland, in the year 1835, verdict was found for the plaintiff, with 1s. damages, subject to the opinion of the Court upon the following case:—

The lessor of the plaintiff, *James Crosthwaite*, claims the property as heir ex parte paternâ of *Peter Crosthwaite*, deceased; and the defendants' claim is as devisees of *Peter Allason*, who was heir at law ex parte maternâ of the same *Peter Crosthwaite*.

One *Peter Spencer* was formerly owner of an estate of which the property in question forms a part, and upon his death his estate descended to his two daughters, *Jane*, the wife of *Richard Allason*, and *Ann*, the wife of *Joseph Crosthwaite*, in coparcenery; upon the death of *Jane*, her estate in the premises descended to *Peter Allason*, her son and heir; and upon the death of *Ann*, her estate in the premises descended upon the said *Peter Crosthwaite*, her son and heir.

The following pedigree, which it is agreed is correct, shews the relative position of the different parties, and their title by descent.



In 1810 *John Nicholson* purchased *Peter Allason's* share of the property, and the same was duly conveyed by *Peter Allason* to *John Nicholson* by indentures of lease and re-lease, dated respectively the 15th and 16th of November,

*A. and B.*, being seised of land in coparcenary, *B.* conveyed his moiety to a purchaser in fee. The purchaser and *A.*, the other parcener, made partition by lease and release, and conveyed the whole to *H.* and his heirs; as to one portion to the use of *B.* in fee; as to the other portion to the use of *A.* in fee. Held, that *A.'s* portion remained descendible to his heir ex parte maternâ.

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1810. The latter deed was made between *Peter Allason* of the one part, and *John Nicholson* of the other part, and the habendum was to *John Nicholson*, his heirs and assigns.

In 1816 *Peter Crosthwaite* and *John Nicholson* made partition of the property by indentures of lease and release, dated respectively the 15th and 16th of April, 1816. The latter deed was made between *Peter Crosthwaite* of the first part, *John Nicholson* of the second part, and *John Huddleston* of the third part; by it the whole of the property was released to *John Huddleston*, habendum as to one portion, being the premises sought to be recovered to the use of *Peter Crosthwaite*, and as to the remainder, to the use of *John Nicholson*.

*Peter Crosthwaite* from that time became and was sole seised thereof in fee, and died so seised in 1819, intestate. Upon his death *Peter Allason* entered into the premises in question, claiming to be entitled as heir ex parte maternâ, and continued possessed until the time of his death.


In 1831 *Peter Allason* died, having by his will, duly attested to pass real property, devised his estate and interest in the premises to the defendants.

*John Huddleston*, the other lessor of the plaintiff, is the lessee to uses mentioned in the deed of partition.

The question for the Court is, whether *James Crosthwaite*, being heir ex parte paternâ of *Peter Crosthwaite*, is as such entitled to all or any part of the premises in question, or whether the defendant or devisees of *Peter Allason*, who was heir at law of *Peter Crosthwaite*, ex parte maternâ, are entitled. If *James Crosthwaite* is entitled, the verdict is to be entered for all or such proportion of the property as the Court may direct. If not, a nonsuit is to be entered.

*Wightman*, for *James Crosthwaite*, the heir ex parte paternâ. By the partition which was carried into effect by the indenture of lease and release, the nature of the estate was changed, and the land became descendible ex parte

paternâ. It is true that if a man makes a feoffment in fee, without declaring any use, and the use result, the nature of the descent will not be changed, and the use will descend in the same manner as the estate out of which it arose was descendible. But if the party declares the use and takes back an estate, the nature of the descent is changed; *Co. Litt.* 12 b; where it is said, "If a man be seised as heir on the part of his mother, and maketh a feoffment in fee, and taketh back an estate to him and to his heirs, this is a new purchase: and if he dyeth without issue, the heirs of the part of the father shall first inherit." (a) 2 *Rolle's Abridg.* 780, Uses, (D) 3; *Abbott v. Burton* (b), *Godbold v. Freestone* (c). At all events, that portion of the estate conveyed by *Nicholson* was descendible ex parte paternâ, as it was acquired by purchase.

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*W. H. Watson* contra. The heir ex parte maternâ is entitled. *Peter Crosthwaite* took the land by descent ex parte maternâ. If a person seised of lands descendible ex parte maternâ, makes a feoffment, and declares the use to himself and his heirs, the use is descendible ex parte maternâ. This is laid down in *Martin v. Strachan* (d); unless the party seised took a different estate, the line of descent is not broken. The effect of a partition is only to regulate the enjoyment of the estate; it does not alter the quality. Thus, in *Comyns' Digest* (e) it is said, "upon partition made, the occupation and descent, which before were in common, shall be several and distinct." "So parceners after partition shall be in from the common ancestor as before, for the partition doth not make any degree," and

(a) *Mr. Hargrave's* note to this passage is as follows:—"But here Lord *Coke* must be understood to speak of two distinct conveyances in fee; the first passing the use as well as the possession to the feoffee, and so completely divesting the feoffor of all

interest in the land, and the second regrantee the estate to him."

(b) 2 *Salk.* 590; *S. C.* 1 *Com. Rep.* 160.

(c) 3 *Lev.* 406.

(d) 5 *T. R.* 107, n.

(e) *Tit. Parceners*, (C 15).

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for this *Savile* (a) is cited. Partition by writ does not even operate as a revocation of a will, nor, according to *Luther v. Kidby* (b), does partition by deed. This proposition was doubted in *Tickner v. Tickner* (c), and *Swift v. Roberts* (d), but *Luther v. Kidby* is recognized in *Harmood v. Oglander* (e), and in *Goodtitle v. Otway* (f).

*Wightman*, in reply. Tenants in common are seised per mie et per tout. *Nicholson* was tenant in common with *Crosthwaite*. That part of the land which was conveyed by *Nicholson* to *Huddleston*, to the use of *Crosthwaite*, must have been taken by conveyance from *Nicholson*, and newly acquired; and of that part *Crosthwaite* became the first purchaser, and it was descendible to his heirs ex parte paternâ.

*Cur. adv. vult.*

LORD DENMAN C. J. on this day delivered the judgment of the Court as follows:—

In this case one of two parceners alienated his moiety in fee, whereby the alienee and the remaining parcener became tenants in common. Afterwards, by deed of partition between the alienee and the remaining parcener, the land was divided by metes and bounds, and each of them took a moiety in severalty. The question is, whether by that deed the parcener took any thing as purchaser, so as to break the descent ex parte maternâ, and to let in the heir of ex parte paternâ on the death of the parcener.

It is admitted, that if the deed of partition had been between the parceners themselves, the descent would not be broken (g). But it is said, that inasmuch as one of the parties to the deed was a stranger in blood, whatever was

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|------------------------------------------|----------------------------------------------|
| (a) 113, <i>Thetford v. Thetford</i> .   | (e) 6 Ves. jun. 199; 8 Ves. jun. 106.        |
| (b) 3 P. Wms. 170, n.; Vin. 106.         |                                              |
| Abr. Devise R. 6, pl. 30.                | (f) Per Lord Kenyon C. J., 7 T. R. 416, 417. |
| (c) Cited in <i>Parsons v. Freeman</i> , | (g) Com. Dig. Parcener, (C 15).              |
| 3 Atk. 741; Amb. 116.                    |                                              |
| (d) Amb. 617.                            |                                              |

taken from him by the parcener must be taken by purchase. And doubtless this would be so if any thing was taken from him, but we are of opinion that nothing was taken by the parcener from the alienee under the deed. The effect of it was only that the parcener had by it a divided moiety in severalty, discharged from any right in the alienee, instead of an undivided moiety in common, but he had the same estate in the land as before.

The consequence is that a nonsuit must be entered (a).

(a) See Chitty on Descent, 131- 287, 3d edit.; Vin. Abr. title Heir, 3; *Doe v. Morgan*, 7 T. R. 103; (W); *Harris v. Bishop of Lincoln*, 3 Cru. Dig. Discent, c. iii. s. 37, et 2 P. Wms. 135; *Doe v. Jackson*, seq.; Watkins on Descent, p. 265, 1 B. & C. 448.

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END OF MICHAELMAS TERM.

# HILARY TERM,

IN THE SEVENTH YEAR OF THE REIGN OF WILLIAM IV.

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The Judges in Banc this term were,  
Lord DENMAN C. J.                      WILLIAMS J.  
LITLEDALE J. (a)                      COLERIDGE J.

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In the Bail Court,  
PATTESON J.

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*Wednesday,  
Jan. 11th.*

The KING v. The Justices of STAFFORDSHIRE.

The rate-payers of a county have, neither at the common law or by statute, any right to inspect and copy the bills of charges of county officers, when they are deposited with the clerk of the peace, among the county records, in pursuance of the 12 Geo. 2, c. 29, s. 8. The right of inspection is confined to the justices of the peace for the county.

A Mandamus had issued from this Court, in Easter term, 1835, to the justices and the clerk of the peace of the county of Stafford, which, after reciting that the said justices and clerk of the peace had refused the inhabitants of a certain township, contributing to the rates in the said county, leave to inspect and take copies of the county rates and assessments, and the orders made for the expenditure thereof, &c. to the great damage and prejudice of the said inhabitants, commanded the said justices and clerk of the peace to allow the said rate-payers of the said township, and A. F. their attorney, to inspect and take copies of all the said rates and assessments made since the 31st December, 1831, and of all orders made for the expenditure thereof, and of the several orders of sessions made thereon, and of all accounts, proceedings, and documents relating thereto, and of the several bills of costs and disbursements of the

(a) *Litledale J.* was unable to attend in Court from Jan. 16th to the end of term, from severe indisposition.

clerk of the peace, comprised in the annual accounts of the said county, for the year 1833.

The justices and the clerk of the peace returned to this mandamus, that they had not refused the inhabitants of the said township to inspect or take copies of the rates or assessments, or of the orders made for the expenditure thereof, or of the orders of sessions thereon, or of all proceedings relating thereto, but on the contrary thereof, on the application of *A. F.*, attorney for the said rate-payers, had made an order at the Midsummer quarter sessions, 1834, to the following effect: "that *A. F.*, on behalf of the said rate-payers, be permitted to inspect," (setting out the documents mentioned in the mandamus, with the exception of the bills of costs and disbursements of the clerk of the peace). The return went on to certify that the justices had always permitted *A. F.*, since the order, to inspect and take copies of all the documents in the said order, and that the only accounts or documents in the custody of the said justices or clerk of the peace, relating to the said rates or assessments, are the within-mentioned bills of the clerk of the peace, and certain other accounts and vouchers of the treasurer and high constable of the said county, all of which have been passed by us the said justices, at our respective quarter sessions, and all of which have been deposited with the clerk of the peace, to be kept among the records of the county, to be inspected from time to time by us the said justices, according to the form of the statute in that case made and provided; and that a true and accurate abstract of the accounts, the receipts and expenditures of the said treasurer, under their several heads, signed by such of us the said justices as audited the same, hath been duly published, once in every year, in a public newspaper, circulated in the said county; wherefore we the said justices and clerk of the peace have refused to permit the said rate-payers to inspect or take copies of the within-mentioned accounts and documents and bills of the clerk of the peace, or any or either of them.

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First point:  
This case go-  
vernèd by *Rex*  
v. *Leicester*.

The prosecutor having moved for a concilium, the cause was set down in the crown paper, and was argued in Michaelmas term by

Sir J. Campbell A. G., for the crown (a). I. This rule has been obtained in order to review the case of *The King v. The Justices of Leicester* (b). That case establishes the important principle, that the contributors to a county rate are entitled to inspect and take copies of it, and all orders for the expenditure of the same. It is submitted that that decision was right, and therefore that the justices have improperly withheld inspection of the disbursements of the clerk of the peace. Unless this right exists, the mere power to inspect the orders for payment is utterly useless; the charges may be legal or illegal, the orders for payment may be within the jurisdiction of the justices or not, but no knowledge on the subject can be gathered from a bare inspection of the orders. The mandamus in *The King v. Justices of Leicester* (b), was in the same terms as the present, and when on the return an attempt was made to re-argue the question, whether the rated parishioners were entitled as of right to inspect the documents mentioned in the writ, relating to the expenditure of the county rate, the Court observed, that they had decided the point on the rule to shew cause, and they ordered a peremptory mandamus to be issued. There is a solemn decision of this Court, therefore, that rated inhabitants have a right to inspect all bills and documents relating to the expenditure of the county rate; and if this were not allowed, they would have scarcely any information at all from merely reading the order, and the abstract of the receipts, directed to be published once a year, by the 55 Geo. 3, c. 51, s. 18, which was an act of the legislature, intended to facilitate, and not to abridge the rights of the public.

Second point:  
The bills of the  
clerk of the  
peace included  
in the order.

II. The bills and disbursements of the clerk of the peace

(a) Nov. 19th and 21st, before Williams, and Coleridge Js.  
Lord Denman C. J., Patteson, (b) 7 D. & R. 370; 4 B. & C. 891.

are parcel of and involved in the order for inspection which the sessions have made; and in fact when the sessions pass the accounts, the bills of the clerk of the peace are affixed to the order for payment; the rate-payers therefore stand in the same situation as if they were recited in the order, and there is as much right to inspect them as the documents expressly mentioned in the order.

III. But the rate-payers are entitled to inspection on another ground. These accounts, after payment, become public documents, and the rate-payers, as parties interested, have a right to inspect them. The position is laid down broadly in *Tidd's Practice* (a).—"It is a general rule, that a party has a right to inspect and take copies of such books, &c. as are of a public nature, wherein he has an interest." And even of private documents, it is apprehended, inspection may be had, when a suit is pending, and both parties have a common interest in the books. Thus in an action on a bill or note, if a special ground is suggested, a judge will make an order for inspection. It is on the same ground that oyer is granted in pleading; by the common law doctrine, every written document is supposed to be under seal, and a party declaring upon it, entitles the other side to oyer, on which it is intended that the instrument is read to the party requiring it, by the Court. A written document not under seal, was considered mere parol, and only as evidence to be produced in Court, and therefore oyer is not granted of it. The earliest case on this subject is *Herbert v. Ashburner* (b), in which it was held that the books of quarter sessions were public documents, which every one has a right to inspect. So, the books of commissioners of lotteries were held to be of a public nature, which all holders of tickets were entitled to inspect; *Schinotti v. Bumstead* (c). Even the registry of a bishop has been allowed to be inspected, *Finch v. Bishop of Ely* (d); and also the documents in the custody

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Third point:  
 Rate-payers  
 entitled to in-  
 spect county  
 rate books as  
 public docu-  
 ments in which  
 they are inter-  
 ested.

(a) 9th ed. 593.

(b) 1 Wils. 297.

(c) 1 Tidd, M. S. 594.

(d) 2 M. & R. 127; 8 B. & C.  
 112.

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of the marshal of the Marshalsea, *For v. Jones*(a). In *Newell v. Simpkin*(b), it was held, that the plaintiff was entitled to inspect the parish books, and a similar order had been made in this Court in *The King v. St. Martin's in the Fields*, which has not been reported. [*Patteson J.* In the case of *Golding v. Fenn*(c), in this Court, inspection was allowed.] In *Burrell v. Nicholson*(d), the only ground for refusing the plaintiff inspection of the parish books was, that he denied he was a parishioner, but the Court of Chancery thought the decision was wrong, and that he was entitled to inspect the books as public documents, in which all are interested. In *Anonymous*(e), a rule for inspection was made absolute in the first instance. [*Patteson J.* The 9th section of 12 Geo. 2, c. 29, says, that the order made by justices to discharge the treasurer, shall be a good release in any Court of law, and that perhaps may be a good reason for refusing the inspection of these accounts.] The order is a discharge of the treasurer, but it is very important to the rate-payers that they should have an opportunity of contesting the validity of the order, which they cannot well do unless they know what payments have been made.

First point.

Sir *W. W. Follett*, contra. It is important to observe the terms used in the mandamus; the writ commands inspection to be given of the county rates, and of all orders for the expenditure *thereof*, and of the orders of sessions *thereon*, and the documents relating *thereto*. And the order of sessions gives inspection of all such documents. The Attorney-General has confounded the order of the justices, and the papers ordered in the mandamus, with the bills and disbursements of the clerk of the peace. *The King v. Justices of Leicester*(f) is very different from the present case, even if the Court should be disposed to uphold it, but

(a) 1 M. & R. 570; 7 B. & C. 732.

(b) 6 Bingh. 565.

(c) Reported on other points, 1 M. & R. 647; S. C. 7 B. & C. 765.

(d) 3 B. & Ad. 649.

(e) 2 Ch. 230.

(f) 7 D. & R. 370; S. C. 4 B.

& C. 891.

its authority has been very much shaken by the recent case of *The King v. The Vestrymen of St. Mary-le-Bone* (a), where the right of inspection was claimed under a local act, but was refused by the Court. In *Rex v. Justices of Leicester* (b), the justices refused the inspection of the order of sessions, as well as of the accounts and vouchers, and therefore no doubt their return to the mandamus was insufficient, but the argument of the Attorney-General there claimed a right to inspect and take copies of *all orders*, for the payment of money out of the county rates. The Court refused to allow the inspection of all the orders for payment, and the case, if upheld, is only an authority that the rated inhabitants of a county have a right to inspect the two last rates and orders for the expenditure of them. [*Patteson J.* And the other proceedings and documents relating thereto.] Those are only words of form. The case has been cited as an authority for the rate-payers to inspect the bills of the clerk of the peace, but the Court will perceive, by the return to the mandamus, that there is a difference between the rule nisi and the peremptory mandamus, as the rule nisi is for an inspection of all the accounts relating to the county rate, but the peremptory mandamus leaves out "accounts."

But it is said the Court has a power to grant a mandamus to inspect these accounts as public documents. But what is the right the rate-payers have to inspect? The Court will not grant the writ to gratify curiosity. The case of *The Vestrymen of Mary-le-bone* (a) was much stronger than the present, for there actual rights were depending upon the entries in the parish books; and by the Reform Act (c) all persons are entitled to inspect the lists made out by overseers; but under the Vestry Act, 1 & 2 Will. 4, c. 60, the Court held that parishioners have no right to inspect the parish books (a). What right then can the inhabitants of a county have? The right, if there be any, must be derived from the act of parliament, for the rate being made under the act, the right to in-

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Second point.

(a) 6 N. & M. 600.

& C. 891.

(b) 7 D. & R. 370; S. C. 4 B.

(c) 2 & 3 W. 4, c. 76, s. 44.

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spect must also be under the act, as there is no common law right to inspect rates made by virtue of an act of parliament. But the act says (a), the accounts of the treasurer "shall be deposited with the clerk of the peace, to be inspected from time to time by the said justices." Surely the legislature had the power to give this right to the justices only. All the jurisdiction on this subject is given to them exclusively, except on the subject of appeals, which does not apply to cases like the present. By the 1st section of the act, the justices are to make one general assessment. By the 6th section, they are to appoint a treasurer. By the 8th section, they, and they alone, are to inspect the accounts and vouchers. By the 9th section, the justices alone are authorized to discharge the treasurer. The 12th section gives an appeal to the justices upon another ground. These provisions, therefore, giving an express jurisdiction to the justices, are an exclusion of any other right to interfere. [Coleridge J. By the 10th section, the justices are prohibited from making a fresh rate, unless three-fourths of the money collected by virtue of the preceding rate have been expended; it would appear by that that rate-payers are entitled to see what the expenditure has been.] A distinction appears to be made between the order for payment and other documents in *The King v. Justices of Leicester* (b); but whether there is or not, that case is much shaken by *The King v. Vestrymen of Marylebone* (c). In *The King v. Clear* (d), where application was made by a parishioner for a mandamus to inspect the churchwardens' accounts, the writ was refused, and *Holroyd J.* said, "The applicant not having stated the grounds upon which he desires to inspect the books, has not brought himself within the rule for granting a mandamus." But what ground has been suggested here? The argument on the other side may prevail on the legislature to take the jurisdiction out of the hands of the justices and give it to the rate-

(a) 12 Geo. 2, c. 29, s. 8.

(c) 6 N. &amp; M. 600.

(b) 7 D. &amp; R. 370; S. C. 4 B. &amp; C. 891.

(d) 7 D. &amp; R. 393; 4 B. &amp; C. 899.

payers, but they have no jurisdiction now. In *The King v. Clear* (a) the question turned on the construction of a poor law act (b), which entitled persons assessed to the poor's rate to inspect the accounts of churchwardens; and it was held, that the applicant should have shown some ground for desiring to inspect the books; so it should be shewn here what ground the parties can have to desire to inspect the rates. [Lord Denman C. J. I apprehend, if your argument is good, it should have been returned by your client to the mandamus; but as it is, I have doubts whether it is ground to be taken now, unless you can shew that in no case a mandamus to inspect county rates can go.] It is submitted, the argument may be used as an inference of law why a writ of mandamus should not go. Circumstances should be shewn why the rule should be granted, for then those circumstances can be denied; if no ground is shewn, it is a fair inference that there is none, and the applicant here only stands on the general rights of certain townships. By the statute 4 & 5 Will. 4, c. 48, s. 1, certain rights of supervision are given to the rate-payers, but there is no power given them by that act to inspect the bills of the clerk of the peace. By that act all the business relating to the application and management of the county rate must be transacted by the justices in open court, and in *The King v. Justices of Nottingham* (c) an attempt was made to extend the act, but it was held, that no rate-payer had any authority to interfere. Lord Denman C. J. said, "If *The King v. Justices of Leicester* (d) be good law, the present case is not brought within it, for no demand has been made which could be complied with." Patteson J. said, "According to the principle contended for by the applicants, all the rate-payers would become the auditors instead of the justices."

As to the cases cited for the inspection of public documents, they do not bear at all, as inspection is only allowed

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(a) 7 D. &amp; R. 393; 4 B. &amp; C. 899. &amp; E. 500.

(b) 17 Geo. 2, c. 38.

(d) 7 D. &amp; R. 370; 3 C. 4 B.

(c) 5 N. &amp; M. 160; 3 C. 3 A. &amp; C. 89.

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where a party is interested in a suit; as in *Fox v. Jones*(a), where the action was against the marshal for an escape, and it was held that as the marshal would have to produce the habeas corpus and return at the trial, it was but justice that he should permit the plaintiff to inspect them before the trial. So, in *The King v. Bishop of Ely*(b), the register was allowed to be inspected, when the patronage was claimed by an individual. So, in *Newell v. Simpkin*(c), inspection was allowed of the parish books, where there was a suit pending on a rate. *Burrell v. Nicholson*(d) was an action between an individual and the parish, and the Attorney-General, in argument, relied on *Cox v. Copping*(e); and if inspection of the books was afterwards allowed, it must have been on the ground of *Sir Charles Burrell* being interested.

Second point. It is said the bills of the clerk of the peace ought to be produced, on the ground of their being affixed to the order for payment at the time they are allowed by the sessions: but the Court cannot take judicial notice of that. If it were so, it ought to have appeared. The mandamus is to allow inspection of the rates and the orders for the expenditure thereof, and the proceedings relating thereto, and separates the bills of the clerk of the peace; the return likewise keeps them separate; and it is submitted that inspection of the orders, &c. has been given.

First point. *Sir J. Campbell* A.G., in reply. It is admitted that the justices and the clerk of the peace have disobeyed a material part of the mandamus. The question therefore is simply as to the legality of that part of the mandamus. The authority of *The King v. The Justices of Leicester*(f) is very strong. It was decided by four eminent judges, on great deliberation; and all the arguments used to-day against the right of rate-payers to inspect, were urged then. The discussion was on the same point. In the return to

(a) 1 M. & R. 570; 7 B. & C. 732.

(b) 2 M. & R. 127; S. C. 8 B. & C. 112.

(c) 6 Bingh. 565.

(d) 3 B. & Ad. 649.

(e) 5 Mod. 396; S. C. 1 Lord Raym. 337.

(f) 7 D. & R. 370; S. C. 4 B. & C. 891.

the mandamus in that case, it was said that the only proceedings relating to the orders for payment were the accounts and vouchers of the treasurer and high constable. It is clear therefore that the peremptory mandamus went to inspect all the accounts relating to the expenditure, as claimed here. [*Patteson J.* The Court said there, that the rule moved for was too general; but I think that applied to the rule asking for inspection for an indefinite number of years, and not, as the argument on the other side supposes, for asking for accounts to which they were not entitled.] That is so, for the peremptory mandamus went in the terms of the rule nisi, except in limiting the right to inspect to the two last rates.

But it is said *The King v. Justices of Leicester (a)* cannot be supported; first, because the rate-payers of a county have no interest in a rate; that they have nothing to do with it but to pay. But the 21st section of 12 *Geo. 2*, c. 29, shews how studiously the legislature preserved a certiorari to the rate-payers to enable them to question the validity of every rate in this Court, and not to leave them at the mercy of the justices. It is true, by sect. 9, the order for payment is final on the treasurer; but the rate-payers have a right to come here, and shew that an order is bad on the face of it. [*Patteson J.* Although, by the 9th section, the treasurer is absolutely protected, it does not follow that the clerk of the peace, or other person making payments, is protected.] Although the treasurer is protected after he has obeyed the order, the certiorari may be obtained before payment, if there is reason to believe the order is invalid. The 10th section was pointed out from the bench to shew that the justices have no power to make a new rate until it shall appear that three-fourths of the money collected on the old rate had been properly expended; and this seems to imply that the rate-payers shall have an opportunity of seeing whether the justices have the power to make this new rate or not. Then, according to *The King v. Clear (b)*, it is

(a) 7 D. & R. 370; S. C. 4 B. & C. 891.

(b) 7 D. & R. 393; S. C. 4 B. & C. 899.

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contended that there can be no right in rate-payers to this writ until a grievance be shewn; but the answer to that has been given by the Court, that a grievance must be shewn before the Court will grant a rule nisi. On this mandamus it is stated that the refusal to inspect has been to the great damage of the rate-payers, and that part has been uncontradicted by the return, and therefore it must be taken to be proved. The act 12 Geo. 2, c. 29, was only passed *ex abundanti cautela*, and the right of rate-payers to inspect the accounts existed at common law previously; before that act it must have been the duty of the county officers to present their accounts, which, on being passed by the justices, if they came into the possession of the clerk of the peace, became part of the county records, and as such the rate-payers were always entitled to inspect them. The return to the mandamus states that the justices have shewn the orders for payment, &c., and then it sets out facts which demonstrate that they have not, for the bills are clearly a part of the orders for payment, and are comprehended in them. The return, therefore, is bad on the face of it; and the Court will quash it without putting the parties to the expense of a trial. *The King v. The Justices of Nottingham (a)* has nothing to do with the present case; for it only decided that rate-payers are not entitled to the inspection of the county rates previous to their allowance by the justices, and without making a demand.

Third point.

It is apprehended that the decision in *Rex v. Mary-le-bone (b)* was not to the effect supposed. The application there was not to inspect books on any common law right, but under an act of parliament; and the opinion of the Court was, that the right did exist under the act, but that the books required to be inspected were not the books contemplated by the act. [*Patterson J. Rex v. Mary-le-bone* was a very complicated case; and it was said that the books in question were all books under the local act.] It is therefore no authority against the right in a party interested to inspect

(a) 5 N. & M. 160; 3 A. & E. 500. (b) 6 N. & M. 600.

public documents. *Herbert v. Ashburner* (a) is an authority that has never been disputed. [*Patteson J.* In *The King v. Trustees of the Northleach Roads* (b), where a local act gave all persons the right of inspection of the trustees' books, and a subsequent local act contained a more limited right to trustees or creditors, but no negative words, the Court held that the right given to all persons by the first act was taken away.] That was a mere statutable right, given to all persons by the first act, and repealed in effect by a subsequent statute: and the books were not of a public nature; for although the good repair of roads is of a public nature, the repairs and expenses relating to them are matters of mere private speculation. The right claimed here is a common law right, which can only be taken away by express terms of the legislature. [*Williams J.* What is the distinct interest in this case on which the rate-payers rely?] Orders made for payment on all the rate-payers in a county affect them all, and if corruptly made, are a grievance. All the other cases concur in shewing that where a party is interested, public books may be inspected as of right. *Schinotti v. Bumstead* (c), *Rex v. Bishop of Ely* (d), *Fox v. Jones* (e), *Newell v. Simpkin* (f). It cannot be said that the rated inhabitants of a county are not parties interested. Without this power to inspect the county expenditure, the greatest frauds and abuses might be committed.

Lord DENMAN C. J. on this day delivered the judgment of the Court as follows:—

The question in this case arose upon the return made by the justices and the clerk of the peace for the county of Stafford to a mandamus, which commanded them to permit certain rate-payers, and their attorney, to inspect and take copies of certain county rates and assessments, and of all orders made for the expenditure thereof, and of the several

(a) 1 Wils. 297. But see *The King v. Sheriff of Chester*, 1 Ch. Rep. 476.

(b) 5 B. & Ad. 978.

(c) 1 Tidd, M. S. 594.

(d) 2 M. & R. 127; S. C. 8 B. & C. 112.

(e) 1 M. & R. 570; S. C. 7 B. & C. 732.

(f) 6 Bing. 565.

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orders of sessions made thereon, and of all accounts, proceedings, and documents relating thereto; and also of the several bills of costs and disbursements of the clerk of the peace, comprised in the annual accounts of the said county for the year 1833. The return to this writ denied any refusal of permission to inspect and take copies of the matters mentioned in the writ, so far as extended to rates, orders for the expenditure, orders of sessions made thereon, and all proceedings relating thereto; and it set out a previous order of sessions for granting inspection of all such proceedings to the attorney for the applicants, and permitting copies thereof to be taken by him. It then concluded as follows: "the only accounts or documents in the custody of us, or either of us, relating to the said rates or assessments, are the within-mentioned bills of the clerk of the peace, and certain other accounts and vouchers of the treasurer and high constables of the said county, all of which have been passed by us at our respective quarter sessions, and deposited with the clerk of the peace, to be kept among the records, and to be inspected from time to time by us, the said justices, according to the form of the statute, &c.; and that a true and accurate abstract of the accounts of the receipts and expenditure of the said treasurer, under the several heads signed by such of us as audited the same, hath been duly published, &c., wherefore we have refused, &c.

This return raises the question, whether the rate-payers of any parish within a county have, as such, any right to inspect and copy the bills of charges of county officers, which having been paid by the treasurer, under orders of justices, have become items in his account, and then having been passed at sessions, and he having been discharged by order of sessions, have been deposited by the clerk of the peace among the county records, in pursuance of the 12 Geo. 2, c. 29, s. 8.

The existence of such right was contended for principally on three grounds—1st. Upon the authority of *The King v. The Justices of Leicester* (a); 2nd. Because the bills in question

(a) 7 D. & R. 370; 4 B. & C. 891.

were parcel of the orders in virtue of which they were paid, of which the inspection was conceited, but that such inspection was wholly nugatory, unless it extended to the bills also; '3rd. Because the bills were public documents, which by the common law every one interested in them had a right to see; and that the provisions relative thereto in the 12 *Geo.* 2, c. 29, and 55 *Geo.* 3, c. 51, were either collateral to or in affirmance of, and certainly did not abridge this right.

Prior to the passing of the 12 *Geo.* 2, c. 29, the justices in sessions were authorized by several acts of parliament to raise rates applicable to specific purposes. By that act, one general rate applicable to all those purposes, and for such sum as the justices shall think necessary, is directed to be from time to time assessed and collected. The monies are to be received by the treasurer, who is appointed by them, and paid according to their orders, for any use or purpose to which the public stock of the county is by law applicable; and no new rate is to be made until the justices are satisfied that three-fourths of the money collected by the preceding rate have been so expended. The treasurer is to keep books and accounts of his receipts and payments, distinguishing the particular uses to which the payments have been applied, and these, with the vouchers, he is to lay before the justices at sessions; and after they have been there passed, both are to be deposited with the clerk of the peace, who is required to keep them among the records of the county, "to be inspected from time to time by any of said justices within the limits of their commissions, as occasion shall require, without fee or reward." When the justices have passed the accounts, their discharge by order of sessions is to be allowed as a sufficient acquittance to the treasurer, in any court of law or equity, to all intents and purposes whatsoever. A limited appeal to sessions is given against the proportions of the rate, but not against the rate itself; and, finally, the jurisdiction of this Court is restrained within certain limits, by the 21st section, as to the

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removal into it by certiorari of any rate, or orders or proceedings at sessions relating thereto.

This act was amended by the 55 *Geo. 3*, c. 51, the principal object of which was to provide for the due proportioning of the rate on the several parishes; but by the 18th section, the treasurer is required, once in every year, to publish in some one of the county newspapers, a true and accurate abstract of his account under its several heads, signed by the justices who shall have audited the same. These are the provisions of the statutes material to the present question, which we have stated thus at length, because they appear to us to furnish very cogent inferences as to the right now in dispute. No one can read the clauses without being satisfied that, subject to the limitations specified, the legislature has placed the whole control, as to the imposition and expenditure of the county rate, in the court of quarter sessions: and with regard to the particular matter of publicity, they provide specifically for the preservation of the vouchers, and for their inspection by a particular class, the members, namely, of the court which controls the expenditure; and provide also for information to be conveyed to the rate-payers in general, by the annual publication of the receipts and payments, in such a form as was deemed sufficient for the purpose. This latter provision may, perhaps, throw some light upon the construction which the former ought to receive; but looking at the former by itself, it is difficult to understand why a specific provision should have been made for the inspection by the justices without fee or reward, if, by the common law, the same right (and it is that same right which is now claimed) existed in favour of every rate-payer. It is remarkable, moreover, that in the same statute, 12 *Geo. 2*, c. 29, s. 14, respecting the repairs of public bridges, banks, &c., a similar provision is made for the preservation and deposit of contracts for the repairs; and as to these, the purpose is declared to be the inspection, not only by the justices, but

by any person employed by any parish, township, or place, contributing to the purposes of the act. The difference in the two clauses can hardly be conceived to have been unintentional.

It is also material to observe, that the duty of preserving the vouchers appears to have been first created by the 12 *Geo. 2*, c. 29. Upon examination of all the statutes recited in the preamble, no such enactment appears among them, though the provision for the absolute discharge of the treasurer by the acquittance of the justices, is copied from one of them—the 11 & 12 *Will. 3*, c. 19, s. 2. Independently of the statute, we know of no direct obligation on the justices to preserve the vouchers of audited accounts, however prudent such a preservation might be; nor do we know of any thing which should make it compulsory on the clerk of the peace to receive such documents, and preserve them among the county records. If this be so, and the statute which first directs their preservation and place of deposit, defines also the purpose of such preservation, and the persons who are to have access to them, what right can others have to inspect them for other undefined purposes? We are of opinion, therefore, upon a review of the provisions of the statutes, that they raise a direct inference against the existence of any such right. It is fitting, however, to consider the weight of the argument independently of these provisions. It is alleged that these are public documents, and that every one having an interest in them has therefore a right to inspect them. It is not necessary to inquire whether these are, strictly speaking, public documents; and though most of the cases cited on this point were examples of the exercise of a power by the Court to compel one of two litigating parties to make reasonable disclosures to the other, we are by no means disposed to narrow our own authority to enforce by mandamus the production of every document of a public nature, in which any one of the King's subjects can prove himself to be interested. For such per-

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sons, indeed, every officer appointed by law to keep records ought to deem himself for that purpose a trustee. But the difficulty is, to see that the present applicants have such an interest as brings them within the rule. During the argument, we inquired what interest in the applicants was relied on as entitling them to the inspection. In answer, it was conceded, that the rate-payers had no direct interest in ascertaining the expenditure of the bye-gone rate, because, even if discovered to be illegal, the monies paid by the treasurer could not be recovered from him; and it is obvious that they could not be recovered from the parties to whom they had been paid, nor from the individual justices who had sanctioned the payments. But it was said, that as the justices at sessions were prohibited from imposing a new rate until three-fourths of the former had been lawfully expended, the rate-payers were interested in ascertaining the nature of such expenditure, to enable them to oppose the imposition of a new rate. The answer to this is, that the rate-payers, as such, cannot by law interfere in the matter. Let it be assumed that the inspection prayed for should disclose an illegal expenditure of a former rate, or the fact that more than one-fourth of the former rate still remained unexpended, in the treasurer's hands, still no rate-payer, as such, could be heard in the Court of Quarter Sessions, to object to the imposition of a new rate; *Rex v. Nottingham* (a). The subject-matter is not one which the rate-payer can bring before the Court as a litigant, nor is he, as such, a member of the Court. The utmost therefore that can be said, on the ground of interest, is, that the applicants have a rational curiosity to gratify, by this inspection, or that they may hereby ascertain facts useful to them in advancing some ulterior measure in contemplation, as to regulating county expenditure; but this is merely an interest in obtaining information on the general subject, and would furnish an equally good reason for permitting inspection of the records

(a) 5 N. & M. 160; 3 A. & E. 500.

of any other county. There is not that direct and tangible interest which is necessary to bring them within the rule on which the Court acts in granting inspection of public documents.

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But it is contended that these vouchers are substantially parcel of the orders which relate to them. But what in truth is the form of the orders, and whether the vouchers are or are not, by any reference or otherwise, so incorporated with them as to become parcel of them, is not disclosed either in the writ or return. The applicants, prior to the date of the writ, had a full opportunity of inspecting the orders; it is therefore their fault that we have not this information,—the language of their own writ raises a presumption against them, and there is every reason to suppose that in truth the orders are perfect instruments without the vouchers.

Second point.

Lastly, however, we are strongly pressed with the authority of *The King v. The Justices of Leicester (a)*, in which Lord Tenterden and this Court made a rule absolute in the very terms of the present. The great authority attached to that decision rendered it necessary for us to grant the writ, and see what return should be made, that the principles on which it rested might undergo the most deliberate revision. We cannot adopt the argument urged at the bar, by which that case was sought to be distinguished from this; because though the refusal of the justices there was too extensive, and the return therefore properly quashed, the Court obviously intended to decide the present question also. After much consideration, we think in that respect it cannot be supported. It is observable, that although the material arguments at the bar against the mandamus received no answer from the other side, and that no reason is stated for the judgment of the Court, yet it appears that no argument was permitted upon the return. Our brother *Littledale*, who was a member of the Court at the time, permits us to say that he disapproves of that case.

First point.

(a) 7 D. & R. 370; 4 B. & C. 891.



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Upon the whole, we conclude that this return is sufficient in law. Much has been said upon the practical irresponsibility which our decision may occasion as to the expenditure of the county rate by the justices. If this consequence really flowed from our refusal of the writ, that would be no reason with us for straining the law to prevent it. The law must be altered by the proper authority, if too much discretion is now vested in the Court of Quarter Sessions.

But in truth, considering the number of the magistracy in every county, the large attendance usual on the days of transacting the county business, that the Court in which it is transacted is an open Court, that all these accounts are there publicly considered, and an abstract of the whole expenditure afterwards publicly circulated, and that the law is most explicit as to the matters to which the county rate is applicable,—it appears to us very unreasonable to apprehend any evil consequences from holding that the magistrates are not compellable to grant to rate-payers generally this inspection. If any abuse exists, it can hardly be supposed that among so many no one magistrate will be found to bring the order before this Court; and the law has given already to him every advantage which the granting of a peremptory mandamus would afford to the present applicants. On the other hand, no slight inconvenience might result from holding that in every county all its thousands of rate-payers, with no interest and without fee or reward, have a right to the inspection now contended for; nor can we believe that such a power would have been given by doubtful implications. We disclaim, however, the being influenced on either side by these considerations, and have attended only to the legal principles, which appear to us applicable, in pronouncing that this return is sufficient.

Peremptory mandamus refused.



SHAW v. ROBBERS and others.

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Wednesday,  
Jan. 11th.

**ASSUMPSIT** on a policy of insurance against fire, against the defendants, as directors of the Norwich Union Fire Insurance Society. Plea, non assumpsit. At the trial before Lord Denman C. J. at Guildhall, at the sittings after Trinity term, 1835, it appeared that the policy executed by the parties was as follows:—"1400*l.* on a *granary* divided in the middle by a party-wall, with a counting-house at the west, and all under one roof, brick and slate. And also a *kiln* for drying corn in and attached to the outward walls of the granary, and communicating therewith by one door. The kiln is built entirely of brick, and iron and tile, except the spars of the roof, and inside plastering. 1000*l.* on *grain*, pulse, seed, and utensils, interest in trade on commission or his own property in the said divided granary. 100*l.* on a warehouse near, but separate, wood, and covered with pantiles. All in the occupation of the assured, and situate in the Boal, near the river Ouse, in Lynn." By an indorsement on the policy, the 1400*l.* was divided into 1350*l.* on the granary and counting-house, and 50*l.* on the kiln adjoining. On the back of the policy, amongst other conditions, were the following:—"3d. Persons insuring will forfeit their right to the sums insured by the policies unless the buildings insured, or containing the goods insured, be accurately described, the trades carried on therein specified, and the nature of the property correctly stated, so that it may be placed under proper classes, and

Where there was an insurance against fire on a granary with a *kiln* for drying corn attached, and the third condition indorsed on the back of the policy stated, that unless the trades carried on in the insured premises be accurately described, and if a kiln or any process of fire heat be used and not noticed in the policy, the policy was to be void; and the sixth condition stated that if the risk to which the insured premises were exposed should be by any means increased, notice was to be given to the office, and allowed by indorsement on the policy, or otherwise the insurance to be

void. A cargo of bark having sunk near the premises of the plaintiff, who was the insurer, he allowed the bark to be dried at his kiln, *gratis*, and in consequence of the fire at the kiln during this process, which lasted three days, the premises were burnt down. In an action against the insurance office, the jury having found that drying bark was a more dangerous trade than drying corn: held, first, that a user of the corn kiln for a different purpose from that intended at the time of making the policy, was not a misdescription or omission, within the meaning of the third condition. Secondly, that a single user of the corn kiln as a bark kiln, *gratis*, was not such an alteration or increase of risk as required notice to be given to the office. Thirdly, that the two conditions taken together did not amount to a warranty that the plaintiff would not use the kiln for other purposes than drying corn. Fourthly, that although the fire is occasioned by the negligence of the assured himself, he, not being guilty of fraud, may recover.

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charged at the appropriate rates of premium; and if a building contain any stove or oven used in the process of manufacture, kiln, furnace, or steam engine, or any process of fire-heat be carried on therein, other than the ordinary risk of common fires in private houses, the same must be noticed in the policy, or it will be void in respect to such buildings and the goods therein.

6th. If any alteration or addition be made in or to the building or covering of any premises insured, or in which any insured property is contained, or the risk of fire to which such building is exposed, be by any means increased, or if any furniture or goods be removed into other premises, such alteration, addition, increase of risk, or removal, must be immediately notified, and allowed by indorsement on the policy, the indorsement being duly made and signed by one of the society's partners or agents, otherwise the insurance as to such buildings or goods will be void.

The kiln mentioned in the policy was used for drying corn until 1832, when a lighter laden with bark having accidentally sunk near the premises insured, the plaintiff gratuitously allowed the owner of the bark to dry it in his kiln. In consequence of this the kiln took fire, and the whole of the property insured by the policy was consumed. No greater fire than usual had been kept, but it appeared that kilns for drying bark, and for drying corn, were differently constructed. In kilns for drying bark, the flues were placed round the room where the bark was placed to dry, but in kilns for drying corn, there were small holes in the flooring, communicating with the fire; kilns for drying bark are insured at a higher premium than kilns for drying corn. Lord *Denman* C.J. desired the jury to answer three questions:—first, whether corn-drying and bark-drying were different trades. Secondly, whether the carrying on the former was more hazardous than the latter; and thirdly, whether the loss happened from using the kiln to dry bark; and his lordship stated his opinion to be, that if the business of bark-drying was different from the one

expressed in the policy, the office would be discharged. The jury found these three questions in the affirmative. The lord chief justice then directed a verdict to be entered for the defendant; but gave the plaintiff leave to move to set that verdict aside, and enter a verdict for the whole sum insured, or such part thereof as the Court might think fit. A rule nisi having been subsequently obtained accordingly,

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Sir *F. Pollock*, Sir *W. W. Follett*, and *Wightman* showed cause against this rule, in Michaelmas term (a). The verdict has disposed of the question in this case, as the jury have found that the business of drying bark is more dangerous than that of drying corn, the insurers, therefore, have not kept the contract which they entered into with the office when they insured a corn-kiln only. That contract is to be gathered from the policy, and the conditions indorsed upon it. The third condition requires, that if in any kiln a process of fire have been carried on in the premises insured, it must be noticed, or the policy will be void. It is submitted here, that the carrying on a different and more dangerous process by the kiln than that described vitiates the policy. If the assured under such a policy once began to dry bark, he might go on ad infinitum, if one user was not sufficient to avoid it; but it is a mis-description, which is as fatal in a policy of this kind, as it would be in a marine policy. Suppose, under such a policy, it had occurred to the plaintiff to dry varnish, which is a trebly hazardous trade, and that after a day or two, a fire had occurred, could it be contended that an insurance of a corn-kiln could protect such a risk as had been introduced on the premises? There is, therefore, a misrepresentation by the plaintiff in the premises he has insured. [*Patteson* J. How can it be said to be a misrepresentation, as the plaintiff, at the time of insuring the property, only intended to insure a corn-kiln?] Misrepresentation is, perhaps, not the right word;

First point :  
Misdescription  
of the bu-  
siness carried  
on rendered  
policy void.

(a) Nov. 22d, cor. Lord Denman C. J., *Patteson*, *Williams*, and *Coleridge*, Js.

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but it is a variance, and lets in all the risk which misrepresentation would occasion. If a party only describes correctly at the time, the trade he carries on, and be allowed to carry on a different trade, without vitiating the policy, he may insure for one business, such as a butcher's, and then carry on the trade of a baker, which is much more hazardous. The present case affords an equally strong illustration: but to allow this would open a door to all kinds of fraud. It is not only on the increased hazard that a variance avoids the policy. In marine insurances, where there is a deviation, the policy is not vitiated on the ground only of the risk being increased, but because the parties have no right to foist a new risk on the assurers. So in land policies, the assurance office requires a particularization of the premises to be insured, and the purposes to which they are to be applied, for the purpose of knowing what risk is to be incurred. On the faith of the description given, the office insures; what right, then, have parties to vary from the description they have given, and the terms of the contract they themselves proposed? No hardship is imposed by applying this principle, as the sixth condition allows of alterations of business, if notice be given to the office, and allowed by them. But the plaintiff has not complied with this condition. There was a more dangerous business carried on with his kiln for three days, and therefore ample time to give notice.

Second point:  
Change of business, and no indorsement on the policy, made it void.

Third point:  
The conditions in the policy amount to a warranty.

It will be contended, perhaps, that the corn-kiln mentioned in the policy was mere description; but that is not so, as the third and sixth conditions, taken together, amount to a warranty that corn only shall be dried at the kiln. If it had been notified to the office that bark also was to be dried, they might have declined the risk, or they would have demanded an increased premium.

Fourth point:  
The loss occasioned by the negligence of the insured.

Again, the object in insuring is to protect against the negligence of servants; but a case of this kind by the assured himself is such gross negligence, as not to entitle him to recover. Suppose a party causes a fire by reading

in bed, would not that absolve the office from the contract they had entered into in insuring against ordinary losses? (a)

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Sir *J. Campbell A. G.* and *Kelly* in support of the rule (b). *Primâ facie* the plaintiff is entitled to recover. This is an insurance against fire, and by fire the loss has been occasioned. Unless, therefore, gross misconduct can be shewn on the part of the insured, he is entitled to a verdict. The facts proved were;—first, that corn-drying and bark-drying are different trades. Secondly, that the drying bark is more dangerous than drying corn; and, thirdly, that the fire arose from drying bark. The first proposition is a truism. Then, as to the second proposition, that the business of drying bark is more hazardous than drying corn. If the words of the policy amount to a warranty on the part of the insured, that the business of drying corn only shall be carried on, then, undoubtedly, the insured has no right to recover. But they do not. The third condition merely says, that the representation made at the time of effecting the policy shall be correct. It is merely to fix the amount of premium. There has been no violation of the sixth condition, for the trade to be carried on is truly stated.

First point.

Third point.

It is said that there ought to have been an indorsement on the policy, that bark was to be dried. If the plaintiff had taken up the trade or business of drying bark, and intended constantly to use the kiln for that purpose, there would be some ground to contend that there should have been an indorsement to that effect on the policy. But it was not proved that any money was received by the plaintiff for allowing this bark to be dried. Trade is something done for profit. A single act of gratuitously

Second point.

(a) See *Austin v. Drewe*, 6 Taunt. 436; *S. C.* 2 Marsh. 130, 4 Camp. 360; *Gregson v. Gilbert*, M. S. Marsh. on Insurance, 697; *Buller v. Fisher*, 3 Esp. 67; *Tait*

*v. Levi*, 14 East, 481; as to the effect of the negligence of parties assured, in avoiding an insurance.

(b) Wednesday, Nov. 23d.

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and others.

allowing a party to dry bark, cannot be considered as carrying on the trade of drying bark. Suppose the drying of the bark had occupied an hour only, would it be necessary to have an indorsement? This condition applies to a permanent alteration in the business carried on. [*Patteson J.* In *Dobson v. Sotheby (a)* a policy of insurance was effected upon a barn. The policy was stated to be on premises where no fire is kept, and no hazardous goods are deposited. The premises were burnt down, and the fire was occasioned by the introduction of a tar barrel, for the purpose of repairing the premises. It was held, that the words of the policy applied to the habitual use of fire.] The whole difference lies between a single act and the habitual and customary mode of carrying on trade. [*Sir F. Pollock.* In *Dobson v. Sotheby*, the fire was occasioned by the negligence of the servant.] This was said to be analogous to the case of a marine insurance, where, if there be a deviation, the policy is forfeited. When a ship is insured for a voyage, the route is the express subject of the contract. In such cases no inquiry is ever made whether there is greater danger in one course than another. This shows the two cases are not analogous.

Fourth point. But then it is said, that because the loss was occasioned by the negligence of the insured, he has no right to recover. The object of an insurance is to provide against negligence as well as accident, *Busk v. The Royal Exchange Assurance Company (b)*, *Walker v. Maitland (c)*, and *Bishop v. Pentland (d)*, establish, that although the remote cause of the loss may be traced to the negligence of the insured or his servants, yet the insured has a right to recover. It is admitted that if the fire had been occasioned by the negligence of the servant of the insured, the insured would have had a right to recover (*e*). In this case there is no

(a) 1 M. &amp; M. 90.

(b) 2 B. &amp; Ald. 73.

(c) 5 B. &amp; Ald. 171.


(d) 1 Man. &amp; R. 49; 7 B. &amp;

C. 219.

(e) *Austin v. Drewe*, 1 Holt,  
N. P. C. 126; S. C. 6 Taunt. 436,  
4 Camp. 360, 2 Marsh. 130.

gross negligence, but at most a want of caution. Is that sufficient to vacate the policy?

*Cur. adv. vult.*

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Lord DENMAN C. J. on this day delivered the judgment of the Court.—This was an action upon a policy of insurance against fire. There were two subjects of insurance of certain buildings, including a dwelling house, and also a kiln for drying corn, attached to the outward wall of the granary and communicating by one door, built of brick and iron entirely. Both were destroyed by the fire. The policy was subject to the usual conditions, amongst which the third provided, that if there were any misrepresentation in the description of the premises, the policy should be void; and the sixth, that if any alteration were made, either in the buildings or the business carried on therein, notice should be given to the insurers, an additional premium, if required, paid, and an indorsement made on the policy, otherwise the policy should be void. It appeared in evidence, that the kiln had been constantly used for the purpose of drying corn only; but that in the year 1832 a vessel laden with bark having been sunk in the river near the premises, and the bark wetted, the plaintiff had allowed the bark to be dried in his kiln as a favour to the owner of it; no notice was given to the insurers; no greater fire than usual had been made; but, in the course of drying the bark, the kiln took fire; both the kiln and the other premises were burned down. The jury found, that corn drying and bark drying are different trades; that the latter is more dangerous than the former, and that the loss happened from the use of the kiln in drying the bark. A verdict was entered for the defendants, with leave to the plaintiff to move to enter a verdict for him, either for the whole amount of the loss or the value of the kiln. The third and sixth conditions were relied on in argument by the defendants, and it was contended that the facts here show either a misdescription of the kiln within the third



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First point.

Second point.

Third point.

condition, or a change of business within the sixth. The two conditions together were also said to amount to a warranty that nothing but corn should ever be dried in the kiln, and what has occurred was likened to a deviation in the case of a marine insurance. It was proved at the trial that a much higher premium was regularly exacted by insurance offices for a bark-kiln than for a malt-kiln. The argument therefore was, that the premises were not truly described in the policy, or that the trade carried on there had been altered at the time of the fire, without notice to the insurance office. We are, however of opinion, that neither of the conditions applies to this case. The third condition points to the description of the premises given at the time of insuring, and that description was in this instance perfectly correct. Nothing which occurred afterwards, not even a change of business, could bring the case within that condition which was fully performed when the risk first attached. The sixth condition points at an alteration of business as something permanent and habitual; and if the plaintiff had either dropped his business of corn drying and taken up that of bark drying, or added the latter to the former, no doubt the case would have been within that condition. Perhaps if he had made any charge for drying this bark, it might have been a question for the jury whether he had done so as a matter of business, and whether he had not thereby, although it was the first instance of of bark drying, made an alteration in his business within the meaning of that condition. But according to the evidence, we are clearly of opinion that no such question arose for the consideration of the jury, and that this single act of kindness was no breach of the sixth condition. The case of *Dobson v. Sotheby (a)* was decided by Lord *Tenterden* upon the same principle, and is an authority nearly in point upon this part of the case. No clause in this policy amounts to an express warranty that nothing but

(a) 1 M. &amp; M. 90.

corn should ever be dried in the kiln, and there are no facts or rule of legal construction from which an implied warranty can be raised. Neither does the principle on which a deviation puts an end to a marine insurance, viz. that the risk insured against is not the same as that incurred, and that the insured have no right to vary it, apply to the present case. This policy, by the sixth condition, expressly provides for such alterations or deviations as the parties deem material: for the reasons already given, we think that the facts of this case do not bring it within that condition, and any thing short of that cannot be considered as an alteration or deviation under this contract. One argument more remains to be noticed, viz. that the loss here arose from the plaintiff's own negligent act, in allowing the kiln to be used for a purpose to which it was not adapted. There is no doubt that one of the objects of insurance against fire, is to guard against the negligence of servants and others; and therefore the simple fact of negligence has never been held to constitute a defence: but it is argued, that there is a distinction between the negligence of servants or strangers and that of the assured himself. We do not see any ground for such a distinction, and are of opinion, that in the absence of all fraud the proximate cause of the loss only is to be looked to. For these reasons we are of opinion that the rule must be made absolute to enter a verdict for the plaintiff for the amount of the whole loss, it having been produced by causes which do not prevent the policy from attaching.

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and others.

Fourth point.

Rule absolute.



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## HAYWARD v. PHILLIPS.

1. In covenant on a lease, in which the plaintiff assigned several breaches for rent arrear, for non-repair, for not painting, and for not repairing after notice, and the defendant pleaded first, that the lease was obtained by fraud, and

2, 3 & 4, performance of the several covenants; a verdict was taken for the plaintiff on the first issue, (fraud,) and damages assessed on the first breach, (for rent,) at 10*l.*, subject to the award of an arbitrator, to whom the cause and all matters in difference between the parties was referred, to order what he should think fit to be done by the parties, and with liberty to amend the record, the issue not having been perfected on the 4th plea. The arbitrator directed that the verdict entered on the first issue should stand, and assessed the damages on the several breaches at 249*l.* in addition to the 10*l.* found on the first breach, for which sum he directed the verdict was to be for the plaintiff: no verdict was taken at the trial for the sum given by the arbitrator:—Held, that as the amount of damages was fixed by the order of reference, and that the arbitrator had no power given him to enter a verdict upon the other breaches, he had exceeded his authority, and therefore that the award was bad.

2. An award published nine days before the end of Hilary term, directed the defendant to pay the plaintiff a certain sum of money, and the plaintiff to lay out a certain sum of money on the premises which the defendant held as lessee of the plaintiff:—Held, that the defendant had not waived any objections that might be taken to the award, by not giving notice to the plaintiff of his intention to apply to the Court after he had heard that plaintiff had commenced the repairs, nor by the defendant's attorney requesting a week's time to pay the money, which the plaintiff granted, on conditions that the defendant appeared to have assented to.

3. When two substantial matters are referred to an arbitrator, and the arbitrator finds only upon one of them, the award is bad altogether, as not being conclusive.

4. Where a cause and all matters in difference are referred, a motion may be made to disturb the award at any time during the next term after the publication of the award; the motion must be made within the first four days, when the cause only is referred, and the arbitrator is put into the place of the jury.

**COVENANT** on lease by landlord against tenant. The declaration alleged several breaches of covenant; first, that on 25th March, 1835, 10*l.* was in arrear for one quarter's rent; second, that defendant did not repair; third, that defendant did not paint; fourth, that he did not repair after notice; and the plaintiff alleged special damage by reason of the breach of the covenant to repair. The defendant pleaded, first, to the whole declaration, that the lease was obtained by fraud, covin, and misrepresentation: and to the several breaches he pleaded respectively, performance of the covenants according to the indenture.

At the trial before Lord Denman C. J., at the sittings in Middlesex, 'after Michaelmas term, 1835, the counsel for the defendant admitted that he had no evidence on the plea of fraud and covin; and as it appeared that the record was not properly made up, from an omission to perfect the issue on the fourth plea, it was agreed that the cause and all matters in difference should be referred to a gentleman

at the bar, who was to have power to amend the record. By the order of Nisi Prius, it was ordered "by the Court, by and with the consent of the parties, that the jury find a verdict for the plaintiff on the first issue, and damages assessed on the first breach 10*l.* and costs forty shillings, subject to the award of *A. B.*, to whom this cause and all matters in difference between the said parties are hereby referred, to order and determine what he shall think fit to be done by the said parties respecting the matters in dispute; and also to amend the record, and to direct what should be done between the parties, except the cancellation of the lease." The award of the arbitrator, after reciting (*inter alia*) that the only matter in difference between the parties, besides the said cause, which was submitted to him, was a claim by the plaintiff against the defendant of 20*l.* for half a year's rent from the 25th March, 1835, to the 29th September, 1835, and that he had amended the record, proceeded thus:—"I do order that the verdict already entered up for the plaintiff on the first issue shall stand; and that the assessment of 10*l.* damages on the first breach in the declaration shall also stand; and I do award and determine, that the defendant did not repair the said premises in manner and form as is alleged in the said plea to the 2d breach; and I do award and assess the damages which the plaintiff has sustained by reason thereof, at the sum of 249*l.* 3*s.*; and I do award that the defendant did not paint the said premises in manner and form as is alleged in the said several pleas to the said breach; and I do award the damage which the plaintiff has sustained by reason thereof at 1*s.*; and I do award that the defendant did not repair the said premises within the space of three calendar months after notice in manner and form as is alleged in the said plea to the last breach; and I do award the damages which the plaintiff has sustained by reason thereof at the sum of 1*s.*; for which *said several sums of 10l., 249l. 3s., 1s. and 1s., amounting altogether to the sum of 259l. 5s., the verdict is to be for the plaintiff over and above his costs and charges*

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by him expended about the said cause. The defendant was further ordered to pay the sum of 20*l.* on a day named to the plaintiff; and the award then proceeded to order the plaintiff, within the space of three calendar months, to lay out in repairs upon the premises, according to the specification of a surveyor annexed to the award, the sum of 193*l.* 6*s.*, and that the defendant should pay the costs of the reference and award.

The arbitrator delivered his award on the 23d January, 1835, in Hilary term, which ended 1st February. On the 28th January, the plaintiff not having received any notice from the defendant, and no motion having been made to disturb the award, agreed with a builder to do the repairs which the plaintiff was directed to do under the award, and which were accordingly commenced, and notice thereof was given to the defendant's attorney. The repairs were subsequently completed by the plaintiff. On the 1st February, notice to tax costs was given to the defendant's attorney, who on the 2d February attended the taxation, when judgment was signed on the verdict directed to be entered by the award. The defendant's attorney made no objection to the proceedings, but requested the plaintiff's attorney not to issue execution, but to give the defendant a week's indulgence for payment of the amount of the verdict and judgment. The plaintiff agreed to time being given, provided the defendant would waive any personal demand upon him for the sum of 20*l.* mentioned in the award. The defendant's attorney replied that this was a reasonable demand, and that he had no doubt it would be acceded to by the defendant, and he took away a memorandum which had been drawn up to that effect, and which he promised to return. On the 9th February, the defendant took out a summons to stay proceedings until the 4th day of Easter term, to enable the defendant to move to set aside the award. On the 16th February, *Patteson J.*, before whom the summons was heard, ordered that all proceedings should be stayed on condition of the defendant bringing into

Court, within one week, £——, and that if the defendant did not pay within a week, the plaintiff should be at liberty to proceed. The defendant did not pay the money into Court, and on the 19th February took out a summons for a month's further time, which the learned Judge discharged.

In Easter term last, Sir *W. W. Follett* obtained a rule nisi for setting aside the award, on the grounds that the arbitrator had exceeded his authority, first, in awarding a larger amount of damages than he had power to award by the order of reference; secondly, that he had awarded damages to the amount of 249*l.* 3*s.* on the second breach; and thirdly, that he had directed a sum of money to be laid out in repairs. The rule was drawn up upon reading the affidavit of the defendant, and the paper writing thereto annexed; and the affidavit of the defendant stated that the paper writing was a true copy of the award.

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Sir *J. Campbell* A. G. and *Jervis* now shewed cause.  
I. The award in this case has not been properly authenticated to the Court, as the rule has been obtained upon reading the paper writing annexed, without stating it to be a copy of the award, which is not sufficient; *Sherry v. Okes* (a).

First point:  
Award not  
properly veri-  
fied.

II. At all events, the application to this Court is too late, as the award was published nine days before the end of Hilary term. In *Rawsthorn v. Arnold* (b) where the reference, like the present, was not under the 8 & 9 Will. 3, c. 15, Lord *Tenterden* C. J. said, "the party seeking to disturb the decision of the arbitrator, should regularly have made his application within the period allowed for moving for a new trial." If that case is good law, it is an answer to the present application. [*Coleridge* J. In that case, the period allowed by the statute for moving had been exceeded, as the award was made in December, and the motion was not made till Easter term.]

Second point:  
Application to  
disturb an  
award should  
be made with-  
in the first  
four days of  
term.

III. Then there has been a distinct waiver by the defend-

Third point:  
Waiver by the  
defendant.

(a) 1 Har. & Woll. 119.

(b) 6 B. & C. 629; 9 D. & R.

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Fourth point:  
 Arbitrator has  
 not exceeded  
 his authority.

ant, as he has allowed the plaintiff to go on making all the repairs and defraying a large sum of money, without intimating any intention to dispute the award.


IV. The objection made to the award is, that no verdict was taken at Nisi Prius for the sum the arbitrator has given; but it will be seen that the first issue between the parties was on fraud and covin, on which no damages could be assessed, and it was clearly the intention of the parties that the arbitrator should enter a verdict on all the issues. The question is, what was the meaning of the parties at the time they consented to a reference. The whole cause and all matters in difference between the parties were referred, and the arbitrator was to order what he should think fit, which is a very special reference, and to be explained, like all contracts, by what the meaning of the parties was at the time. This meaning is to be gathered from the submission; and if the arbitrator had no power to assess damages on all the issues it would have been unnecessary to give him the power to amend. The cases in which it has been held that an arbitrator cannot award a greater sum than that for which the verdict is taken, are all distinguishable. Thus in *Prentice v. Reed* (a) the verdict was taken on the whole issue, and the amount only was referred. So in *Pearse v. Cameron* (b) the verdict was taken for the *damages* in the declaration, subject to a reference; and Lord *Ellenborough* said, "the smallness of the sum might have been an inducement to the other party to submit to the reference." But that cannot be the case here. So in *Bonner v. Charlton* (c), the cause itself was not referred, but only the amount; and it was held, rightly, that the arbitrator had not power to give damages beyond the verdict. But here full powers were given to the arbitrator to order and determine what he should think fit; and he might have directed one of the parties to give a warrant of attorney to confess judgment, à fortiori to direct a verdict to be entered.

(a) 1 Taunt. 151.

(c) 5 East, 159.

(b) 1 M. &amp; S. 675.

Sir *W. W. Follett* contrà.—Mr. *J. Patteson* could never have made such a rule as that in *Sherry v. Okes* (a): the fact is, in that case there was no affidavit to verify the award at all, or to show that the paper writing mentioned in the rule was connected with the award; and that was the ground of the decision, as appears from another report of the case (b); here the affidavit, in distinct terms, states the paper writing to be a copy of the award.

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 First point.

II. As to the time of making the application in cases not strictly within the statute of 8 & 9 *Will.* 3, the dictum of Lord *Tenterden* in *Rawsthorn v. Arnold* (c) has not been followed in practice. In *Macarthur v. Campbell* (d), *Parke* B. said “the Court adopts the provisions of that statute as a rule in other cases;” and in *Allenby v. Proudlock* (e), *Coleridge* J. laid down the same rule distinctly.

Second point.

III. It must be seen, therefore, whether the award can be supported. The rules are clear, that when a verdict is taken at *Nisi Prius*, the arbitrator has not power to go beyond that verdict; and that if a verdict is not taken, he has not power to order one to be entered. When it is said that in the cases in which the authority of the arbitrator has been held to be so limited, the amount only was referred, it is not so, for in *Prentice v. Reed* (f) the cause was referred, and all matters in difference, and the arbitrator was to direct what should be paid to the plaintiff; but notwithstanding, it was held that he could not award a larger sum than that for which the verdict was taken. So in *Pearse v. Cameron* (g) the reference was of all matters in difference, and the verdict being taken for a certain sum, it was held, that the arbitrator had not power to go beyond it. [*Coleridge* J. I suppose in these cases the verdict was taken on all the issues generally.] It was, but that forms another objection to the present award, because the arbi-

Fourth point.

(a) 1 Har. & Woll. 119.

(b) 3 Dow. Pr. Ca. 349.

(c) 4 N. & M. 208; 5 B. & Ad.  
 518.

(d) 9 D. & R. 556; 6 B. & C. 629.

(e) 4 Dowl. Pr. Ca. 54.

(f) 1 Taunt. 151.

(g) 1 M. & S. 675.



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trator was not authorized to enter a verdict at all on the other breaches. As the price of submission, a party may be willing to refer all matters, on the condition that a verdict shall not be taken, but he would not refer if the same powers are to be exercised against him, as if a jury had pronounced a verdict against him. [*Coleridge J.* The arbitrator had power to direct money to be paid, why should not the ordering the verdict to be entered be an indirect mode of doing that?] That was so held in *Cartwright v. Blackworth (a)*, but that case was overruled in *Donlan v. Brett (b)*, which decides also that an arbitrator has no power to order a verdict to be entered, unless the order of reference contains an authority to that effect. *Hutchinson v. Blackwell (c)* is an authority on the same point. [*Coleridge J.* Should you not have applied to set aside the execution on the award, because you admit the award is good in part, namely, as to the verdict for 10*l.*?] If the award is bad in one substantial part, it is bad for the whole; for if a party refers two substantial matters, and the arbitrator only decides on one, it is not an award of the matters in difference, and therefore cannot be supported, as a party only consents to refer in order to have a settlement of the matters in difference. Here, the arbitrator has directed a verdict to be entered and repairs to be done. Execution could not have been set aside, because the judgment would appear perfectly regular. In *M<sup>c</sup>Arthur v. Campbell (d)* the Court observed, "The old rule was said to be this: if an award is defective in any substantial particular, the parties might wait till execution was taken out upon it, but it does not seem necessary to wait for that, but a motion may be made at once to set it aside." As to the waiver, there is no pretence for it, as it does not appear at all that the defendant acquiesced in it, or that the attorney of the defendant had any power to make the waiver.

Third point.

Fourth point. Lord DENMAN C. J.—On looking at the order of refer-

(a) 1 Dowl. Pr. Ca. 489.

(c) 8 Bingh. 331.

(b) 4 N. & M. 854; 2 Ad. & El. 344.

(d) 4 N. & M. 208; 5 B. & Ad. 518.

ence, it clearly appears that the arbitrator had no power given him to enter a verdict on the other breaches, and therefore the case is brought completely within the decision in *Donlan v. Brett* (a).

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LITTLEDALE J.—In the case of *Bonner v. Charlton* (b), Fourth point. where the verdict was taken for 30*l.* subject to a reference, the Court held the arbitrator had the power to assess the damages within the amount, but not to exceed it. And the principle is clear, that the parties have limited the discretion of the arbitrator, who has no power to exceed the authority given to him. As to the time within which a motion on an award, not within the statute, should be made, I quite agree with my brother *Coleridge*, that when a cause and all matters in difference are referred, the motion may be made at any time within the next term. No doubt if an award is published, and the party against whom it is made do not move to set it aside within the first four days of term, the other party may sign judgment. Second point.

WILLIAMS J.—I quite agree that if the order of reference limits the arbitrator to a certain sum, or does not authorize him to enter a verdict, he exceeds his authority if he either gives a larger sum, or authorizes a verdict to be entered. Fourth point.

COLERIDGE J.—I thought at first the arbitrator had power to direct a verdict to be entered, but as it appears he had not, the authority of *Donlan v. Brett* (a) is conclusive; nor can it be considered an indirect mode of ordering money to be paid by the defendant to the plaintiff. The occasions on which the motion to disturb an award should be made within the first four days of the next term, are where a verdict is taken at *Nisi Prius*, and the arbitrator is put merely into the place of the jury. As to the waiver which it is contended was made by the de- Fourth point. Second point. Third point.

(a) 4 N. & M. 854; 5 Ad. & El. 344. (b) 5 East, 139.

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defendant to any defects in the award, I do not think it has been at all made out. The application by the attorney for time when costs were being taxed and execution about to be taken out, he giving no intimation that he was about to move to disturb the award, certainly does not amount to a waiver, especially as it does not at all appear that the defendant was a party to the transaction.

Rule absolute.

The action was subsequently tried at the sittings in Westminster after this term, when the plaintiff obtained a verdict.



Thursday,  
 Jan. 12th.

The KING v. The Inhabitants of SANDHURST.

If service by an apprentice with a second master, can in other respects be construed to be a good service under the indentures with the first master, it is immaterial whether the second master know the fact of the apprenticeship or not.

ON appeal against an order of two justices, whereby *Benjamin Roberson*, his wife *Mary*, and their four children, were removed from the parish of Battle, in the county of Sussex, to the parish of Sandhurst, in the county of Kent; the sessions confirmed the order, subject to the opinion of this Court on the following case.

The pauper, *Benjamin Roberson*, was born on the 10th November, 1805, and being settled in Sandhurst, in the county of Kent, in the year 1816 was put apprentice by his father, *Richard Roberson*, to his brother, *George Roberson*, in Sandhurst, to learn the trade of a cordwainer. No indentures were then executed; but by indentures of apprenticeship bearing date the 22d December, 1818, to which *Richard Roberson*, the father of the pauper, *Benjamin Roberson*, the pauper, and *George Roberson* his brother, were parties, the pauper was, with the consent of his father, bound apprentice to *George Roberson*, who resided at Sandhurst aforesaid, to learn his art, and with him after the manner of an apprentice to serve until the end of seven years to be computed from the 10th November, 1816 (when *Benjamin*

first entered into the service of *George*, and from whence he had faithfully served him). By the same indentures *George Roberson* covenanted with *Richard Roberson*, the father, that *George* should teach and instruct, or cause to be taught and instructed, his said apprentice in the art of a cordwainer, and should find him meat, drink, and lodging during the term of his apprenticeship. And the father, *Richard Roberson*, covenanted to provide fit and proper clothes and medical aid for him during the same period. When the pauper had been with his master almost five years in the whole, the master being short of work, it was agreed between the father, master, and pauper, that the latter should endeavour to get work at Mr. *Thorpe's* at Battle, as they had heard that he took apprentices; but it was agreed that the indentures should not be given up. In consequence of this arrangement, the pauper's brother, *Richard Roberson* the younger, who was also a cordwainer and resided at Sandhurst, accompanied the pauper to Battle, and applied to Mr. *Thorpe* to know if he could take him into his employ. *Richard* told *Thorpe* that the pauper had worked at the trade of a shoemaker for some considerable time, and that his brother, for whom he had been at work, had not sufficient employment for him; but he did not tell him that the pauper was an apprentice. *Thorpe* told *Richard* that his brother might come for a month on trial, and if he suited he would take him for two years. *Thorpe* was to have 5*l.* with him, and to board and lodge him, and teach him his trade. *Richard Roberson*, the younger, returned to Sandhurst and informed his father and brother *George* what had taken place, and his father agreed to pay the 5*l.* if the pauper suited, and *George*, the master, agreed that the pauper should go to *Thorpe's*. The pauper went accordingly to *Thorpe's*, at Battle, and having staid the month, took a note from Mr. *Thorpe* to his father, to say he might remain on the terms agreed on; and the father thereupon sent the 5*l.* by the pauper, who continued with him at Battle, receiving board, lodging, and

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instruction from him in the art of a shoemaker, according to his agreement, until the expiration of two years, which took place in July, 1823. The indentures were retained by the master, *George Roberson*, until a few months before the expiration of the two years, when *George*, the master, met the pauper at their father's house, and *George* then told the pauper he was his apprentice, and that he could claim him after he had left Mr. *Thorpe's*, for that he would leave *Thorpe's* in July and his time would not be up till November. The pauper said he did not think it would be right for him to do so; and *George* then agreed to give the pauper out of his time. The following memorandum was indorsed on the indentures of apprenticeship, which were then given up: "*George Roberson*, the master of *Benjamin Roberson*, his apprentice, do, by consent of his father, give him out of his time, this 5th day of April, 1823, on account of not having employment for him." This memorandum was signed by *George Roberson* the master, *Richard Roberson* the father, and the pauper. In 1834 the pauper became chargeable to the parish of Battle, and was removed with his family from thence to Sandhurst, and against this order of removal Sandhurst appealed. Upon the above facts the court of quarter sessions handed down to the clerk of the peace the following memorandum: "The court are of opinion that the service in Battle was not in pursuance of the indenture of apprenticeship entered into by the pauper with his brother; but that the pauper continued settled by his prior service in the parish of Sandhurst;" and therefore adjudged that the said order should be confirmed, subject to a case for the Court of King's Bench, and directed the conclusion as above stated to be inserted in the case.

*Thesiger* and *W. H. Watson*, in Michaelmas term (a), supported the order of sessions. There was a fresh binding in this case without any recognition of the former indenture of apprenticeship, which therefore brings it within

(a) Nov. 16th, cor. Lord Denman C. J., *Patteson*, *Williams*, and *Coleridge* Js.

*Rex v. Inhabitants of Christowe* (a). All the cases in which service with a second master has been held to be under the original indentures, unite in showing that the second master knew the fact of the pauper being an apprentice. Thus in *Rex v. Bradstone* (b), there was an express notice of the fact to the second master. In *Rex v. Bradninch* (c), it was found as a fact in the case. In *Rex v. Shebbear* (d), *Sleeman*, the second master, would not take the lad without the consent of the master to whom he had been assigned; and in *Rex v. Banbury* (e), which is the latest case upon the subject, Lord Denman C. J. said expressly, that the second master "must be taken to have known that the relation of master and apprentice must have existed between them." It is true that *Littledale* J. intimated a doubt as to that fact being found in the case, and observed that there were cases which showed the want of notice was immaterial. But it is submitted the authorities are uniform the other way. The opinion of the text writers appears positive on the subject. Thus Mr. *Nolan*, after citing the cases which show that consent to the continuing service must be given by the *first* master, goes on to say, "and it seems not less reasonable, and therefore equally a necessary ingredient, at least in most cases, that the *second* master should know that the apprentice, during the time of serving him, stood in the relation of an apprentice to another master (f)." *Rex v. Holy Trinity in the Minories* (g), is the only case which can be brought forward as a contrary decision. In *Rex v. Banbury* (e) *Patteson* J. seemed to think the second master in *Rex v. Holy Trinity in the Minories* (g) knew nothing of the apprenticeship; but it may be gathered from the facts there stated, that the second master did know, for it appears that there was a communication between the two masters on the subject; if he did not, that case cannot be supported after the recent decisions. On the other hand, there are two cases in which

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(a) 11 East, 95.

(b) 2 Const's Bott, 422.

(c) 2 Const's Bott, 430.

(d) 1 East, 73.

(e) 2 N. &amp; M. 105; 5 B. &amp; Ad. 176.

(f) 1 Nol. 581.

(g) 3 T. R. 605.

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it appeared that there was no knowledge of the fact by the second master, and the Court held that that prevented the service from being a service under the indentures. *Rex v. Ashby de la Zouch* (a), and *Rex v. Whichchurch* (b). And the principle is plain, for unless the second master knows the pauper is serving him under an indenture of apprenticeship, how can he exercise the control over him as an apprentice, which is very different from that exercised by a master over his servant. It may be suggested that this case differs from the two last cited, inasmuch that the pauper here goes to the second master not as a servant, but to learn his trade; but so it was in *Rex v. The Inhabitants of Ecclesfield* (c), yet the Court held there that no settlement was gained. But *Rex v. The Inhabitants of Shipton* (d), is conclusive on the question before the Court. Lord Tenterden C. J. said there, "In order to gain a settlement by apprenticeship, there must be a continued service under the indenture." In this case the sessions have found that there has not been a continued service. That is a *fact*, therefore, which has been found by a competent tribunal, and is decisive of the question before the Court.

*Darby* and *G. F. Jones* contra. This is the first case in which the question whether it be necessary that the second master should know of the former apprenticeship has been expressly raised. All the cases in which that fact has appeared, one way or the other, have been decided on different grounds. Thus, in *Rex v. The Inhabitants of Christowe* (e), and *Rex v. The Inhabitants of Ecclesfield* (c), fresh indentures of apprenticeship were made under seal and inconsistent with the first, and the Court held that it was both illogical and untrue to say that service under the second contract was service under the first. In this case the service under the second master was by parol, was in furtherance of the object of the original indentures, and consistent in every

(a) 1 B. & Ald. 116.

(b) 1 B. & C. 574.

(c) 6 M. & S. 173.

(d) 2 M. & R. 217; 8 B. & C. 88.

(e) 11 East, 95.

respect with the first contract, and if the original master had been sued on his covenant to teach, he might have proved a plea of performance by the service at Battle. It could not have been replied as a defence, that the master who was teaching him the trade did not know that he had been an apprentice before, for that would have been a wholly immaterial issue. Another class of cases, in which it has been held that no settlement has been gained under the indentures, has been decided on the ground of the pauper making a contract for himself as if he were *sui juris*, and to serve as a servant, *Rex v. The Inhabitants of Ashby de la Zouch* (a), *Rex v. The Inhabitants of Shipton* (b); in the latter case Lord Ten-terden C. J. puts it expressly on the ground of the contract with the second master being a hiring and service, which was therefore necessarily unconnected with the former apprenticeship. A distinction that will perhaps reconcile all the cases is this,—if the pauper hire himself *as a servant* to a second master, if the latter knows that the pauper is an apprentice, and takes him with the consent of his former master, it may be inferred that the same relation of apprenticeship will continue; but if the second master take him as an *apprentice* (not by deed under seal) on the same terms as his former master, it is immaterial whether he knows that the pauper had been an apprentice before or not. This distinction appears to have been present to the mind of Parke B. in *Rex v. The Inhabitants of Banbury* (c), and clearly is borne out by that case; for there the pauper, with the consent of his first master, engaged himself to work for another, and the Court held that he engaged himself as an apprentice, and therefore that a settlement was gained, although there was no evidence that the second master knew any thing of the former apprenticeship. For the Lord Chief Justice's opinion, which has been cited on the other side, that the second master did know of the former apprenticeship, was clearly not necessary to the decision of the case, as *Littledale J.* and *Patteson J.* who concurred

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(a) 1 B. &amp; Ald. 116.

(c) 2 N. &amp; M. 105; 5 B. &amp; Ad. 176.

(b) 2 M. &amp; R. 217; 8 B. &amp; C. 88.



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in the judgment, thought that that knowledge did not exist. And *Parke J.* who differed from the rest of the Court, on another point, intimated that "If the first master had communicated to the second that the pauper was his apprentice, and the second master had received him in that character, the inhabitation would have been connected with the apprenticeship." The distinction therefore taken by *Parke B.* in *Rex v. The Inhabitants of Banbury (a)*, clearly shews that if the service be as an apprentice, it is an immaterial circumstance whether the master knows of the former apprenticeship or not. If it should now be held, that the knowledge of the second master is a material fact, *Rex v. Banbury (a)* must be overruled; and *Rex v. The Inhabitants of Overton (b)*, confirms this view; for although the Court said there, that the second master *probably* knew the fact, if they had thought it an important fact for their decision, they would have sent the case back to the sessions to have it determined, but in no case has that been done. [Lord *Denman C. J.* The fact was found in *Rex v. The Inhabitants of Shipton (c)*, and relied on there.] That case comes within the first part of the distinction, as the Court held that that was a distinct contract of hiring as a servant, and the pauper acted *sui juris*. As to the last point, it is impossible to contend that the finding of sessions as to a residence under indentures is conclusive, as that is a question of law composed of many facts, and as such has been constantly sent up to this Court for their opinion. *Rex v. The Inhabitants of Banbury (a)*, *Rex v. The Inhabitants of Shipton (c)*.

LORD DENMAN C. J.—We will take time to consider of our judgment, but I cannot help saying, that the facts in the case of *The King v. Inhabitants of Banbury (a)*, were quite sufficient to warrant the sessions in finding that both of the masters with whom the pauper lived knew of the former apprenticeship.

*Cur. adv. vult.*

(a) 2 N. & M. 105; 5 B. & Ad. 176. (c) 2 M. & R. 217; 8 B. & C. 88.  
 (b) Burr. S. C. 549.

Lord DENMAN C. J. now delivered the judgment of the Court as follows :—The question in this case is, whether the pauper, having been regularly bound apprentice to his brother in the parish of Sandhurst, and having served him there, has gained a settlement by subsequently serving a second master in the parish of Battle during the period of apprenticeship. In this case the first master expressly consented to the particular service with the second; and that service was on the express oral contract that the second master was to board and lodge the pauper and to teach him his trade, being the same trade as the first master carried on. It was, therefore, so far in furtherance of the indenture of apprenticeship, as that the two objects of that indenture, namely, the maintenance and teaching of the apprentice, were provided for. It was also expressly agreed between the first master, the pauper, and his father, that the indenture should not be given up; neither was it, in point of fact, given up, until long after the pauper had served the second master for forty days. It is, therefore, perfectly clear, according to the decided cases, that *as between the first master and the pauper*, the service to the second master was under the indenture, the relation of master and apprentice still subsisting between them, and the covenants in the indenture being performed on both sides by the teaching and maintaining by, and the service with, the second master. But it is found in terms, that the second master did not at any time during the service know that the pauper was an apprentice, and the only point in the case is, whether it is material that the second master should know that fact. Upon examination of the older cases upon this subject it will be found, that in some of them the second master did know the fact; in others it may be doubtful whether he did or did not; but in none of them is such knowledge expressly negatived. No point is however made in any of them upon the knowledge or ignorance of the second master, until the case of *Rex v. Ashby de la Zouch* (a), followed up by *Rex v. Whitchurch* (b),

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(b) 2 D. &amp; R. 845; 1 B. &amp; C. 574.

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but neither of those cases turns upon that point, inasmuch as in the former case the sessions negative the consent of the first master to the particular service, which is clearly necessary; and in the latter such consent was plainly never given. In the subsequent case of *Rex v. Banbury (a)*, it seemed doubtful whether the second master knew the fact, and the Court differed in opinion, both as to the fact of knowledge and its materiality. It can hardly be said upon these authorities that there is any clear and express decision upon this point. The question arises on the stat. 3 *Will. & Mary*, c. 11, s. 8, which enacts, "That if any person shall be bound an apprentice by indenture, and inhabit in any parish, such binding and inhabitation shall be adjudged a good settlement." The word *service* is not mentioned in the statute; but binding and inhabitation, as was observed in the case of *Rex v. Linkinhorne (b)* and other cases. The true construction to be collected from the cases appears to be, that it will be sufficient if the residence be in pursuance of the contract of apprenticeship, and in some way or other in furtherance of the object of the apprenticeship." Here the residence was in furtherance of the object of the apprenticeship, viz. maintenance and teaching; it was in pursuance of the contract, for the first master having no employment consented to the service with the second, that by these means he might perform his covenant; for, having been in part taught by the first master, he is permitted to go to the second to have his education completed under the indenture. Of what consequence then can it be whether the second master knew that the pauper was an apprentice or not? What difference would such knowledge have made in the situation or relation of the parties? None whatever: it would not have created the relation of master and apprentice between the second master and the pauper: such relation could only be created by a regular assignment of the indenture (even supposing, for the purpose of the argument, that such would be the effect of an assignment of any other than a parish apprentice,) or by cancellation of it and a new binding by another: it never

(a) 2 N. & M. 105; 5 B. & Ad. 176.

(b) 3 B. & Ad. 413.

subsisted, nor was intended to subsist, between the second master and the pauper, but continued uninterrupted between the latter and the first master. The dicta, indeed, of the learned judges in the cases of *Rex v. Ashby de la Zouch* (a), and *Rex v. Whitchurch* (b), seem to lead to the conclusion that they thought that the relation of master and apprentice must subsist between the second master and the pauper; for they say, how could he be serving as an apprentice, when it was not even known that he was an apprentice. But if the point had been necessary to the determination of those cases, we cannot doubt but that they would have seen, that in the absence of a regular assignment, the actual relation of master and apprentice could not be created, and that knowledge of the fact of the binding would in no way constitute such relation. The expression, "serving as an apprentice," if it be understood with reference to the object of apprenticeship, namely, the being taught, and as distinguished from serving generally without such object, is quite correct; and it is obvious that in such sense the pauper in this case, under the oral contract for teaching, was "serving as an apprentice;" but it is equally obvious, that this did not in any respect depend on his master's knowing that he was an apprentice, but upon the nature of the contract which he made. The second master is in some measure substituted for the first; inasmuch as the first consents that the apprentice shall learn from the second that which he has himself covenanted to teach: yet the second master need not be bound by the same engagements as the first, for if he need, then no service to a second master could be sufficient, except by a regular transfer of the contract, that is, the indenture, to hold which would be contrary to all the decisions as to service with a second master by consent of the first. It may be observed, that in *Rex v. Banbury* (c), my brother Parke gave only this effect to the decisions in *Rex v. Ashby de la Zouch* and *Rex v. Whitchurch* (b), that the second master's ignorance of

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(a) 1 B. &amp; A. 116.

(c) 2 N. &amp; M. 105; 5 B. &amp; Ad. 176.

(b) 2 D. &amp; R. 845; 1 B. &amp; C. 571.

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the apprenticeship furnished strong evidence that the second service was unconnected with any apprenticeship. Possibly what is said in those two cases as to the knowledge of the second master, may be supported on that ground; we think it cannot, as establishing the doctrine now brought into question: as to which doctrine this further remark is to be made, that my brother *Littleale*, considering the precise question on principle in *Rex v. Banbury* (a), declared a distinct opinion, that the second master's knowledge of the apprenticeship is not necessary. Upon the whole, we are of opinion that the true question in all such cases is, whether the service to the second master is a constructive service to the first master under the indenture, as between him and the apprentice; and that to the solution of that question it is wholly immaterial whether the second master knew of the apprenticeship or not. The order of sessions must be quashed.

Order of Sessions quashed.

(a) 2 N. & M. 105; 5 B. & Ad. 176.

*Thursday,*  
*Jan. 12th.*

When the Court of Quarter Sessions dismiss an appeal subject to a case, this Court will not grant a mandamus to enter continuances and bear the appeal.

*The KING v. The Justices of SUFFOLK.*

*AUSTIN*, in Easter term last, had obtained a rule nisi for a mandamus to the Justices of Suffolk to enter continuances upon an appeal, wherein the inhabitants of the parish of St. Andrew, Ilkeshall, were the appellants, and the inhabitants of the parish of Chediston, the respondents. It appeared by the affidavits, that an order of removal of a pauper, and her four children, had been made, from the parish of Chediston to the parish of St. Andrew, Ilkeshall; and that prior to the removal an information and complaint of the overseer of Chediston, as to the chargeability of the pauper, was duly made at the time of the examination, before two justices of the peace; that notice in writing of the chargeability of the pauper was sent to the parish officers of St. Andrew, Ilkeshall, with a copy of the order of removal, and of the examination before the justices, with the exception of the examination of the overseer of Chediston, as to the chargeability of the pauper.

The parish of St. Andrew, Ilketshall, appealed against this order of removal, and gave notice as a ground of appeal, that it did not appear by the copy of the examination sent to them, that the pauper, at the time of the order being made, was chargeable. The appeal came on to be heard at the Suffolk quarter sessions, when, on the appellants putting in their notice of appeal, and the respondents putting in the original examination, on which the order was made, the Court quashed the order, subject to the opinion of the Court of King's Bench, because, by the examination sent to the appellants, it did not appear that the pauper was chargeable.

*B. Andrews* now showed cause. It has been already decided, that when the Court of Quarter Sessions grants a case, and gives the opportunity of a complete remedy being afforded, this Court will not grant a mandamus; *Rex v. The Justices of the West Riding of Yorkshire (a)*; and the present is a still stronger case; for here, if the Court had refused to grant a case, a fresh order of removal might have been made, and another appeal have come on for hearing.

The Court called upon *Austin*.

*Austin*, contra. *Rex v. The Justices of the West Riding of Yorkshire(a)* is distinguishable from the present case. That was a case of a respited appeal; and the practice of the West Riding required notice of trial of a respited appeal to be given by the appellants; because the appellants had given no notice, the justices at sessions would not go into the appeal, but confirmed the order, subject to a case; and Lord Denman C. J. said, he was unwilling to interfere with the practice of the Courts below. But this case is one of general importance under the New Poor Law Act, not a question of sessions practice. There was no inquiry in this case at all into the merits; and if the Court will not grant a mandamus, justice will not be done, except in a very circuitous and expensive method.

(a) 3 N. & M. 757; 1 A. & E. 606.

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Lord DENMAN C. J.—I do not think we meant to proceed in the case of *Rex v. The Justices of the West Riding of Yorkshire (a)*, on the distinction now pointed out, that it was a mere question of sessions practice. If the Court of Quarter Sessions grant a case, they afford a ready mode by which a complete remedy may be afforded for any misdecision, and it is quite impossible to grant two modes of compelling a proper decision to be arrived at.

Rule discharged with costs.

(a) 3 N. & M. 757 ; 1 A. & E. 606.

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The KING v. GARDNER.

Where a railway act authorized the company to take lands of individuals, making compensation for the same, and enacted, that if disputes should arise as to the price, the value was to be settled by a jury; and in case the jury should give a greater sum than had been offered by the company, "all the costs of summoning the jury and the expenses of witnesses," were to be defrayed by the

**COLTMAN**, in Easter term last, obtained a rule calling upon the defendant, one of the coroners for the county of Lancaster, to shew cause why a writ of mandamus should not issue to him, directing him to review his taxation of the bill of costs of *R. T. T. Norreys, Esq.*, in respect of an inquisition taken before the said coroner, for assessing damages under stat. 4 Will. 4, c. xxv (a), and to allow

(a) An Act for uniting the Wigan Branch Railway Company and the Preston and Wigan Railway Company, &c.

Section 17, empowered the company to take the land of any person whatsoever for the purposes of the act, making compensation for the same.

Section 66, enacted, that in case differences should arise between the

company and parties as to the lands to be taken, the value should be settled by a jury; and there was a proviso, that in all cases where there was an inquiry, the person claiming compensation should always be deemed to be plaintiff, and entitled to the same rights and privileges as plaintiffs in actions at law are entitled to.

Section 71, enacted, that in

company; but if the jury should give the same or a less sum than had been offered, one moiety of the said costs and expenses was to be defrayed by the party to whom the lands belonged: and a subsequent clause enacted, that the party with whom the company should have any dispute, should enter into a bond to pay his "proportion of the costs and expenses of summoning and returning such jury, and taking such verdict, and of the summoning and attendance of witnesses," in case any part of such costs should fall upon him: Held, that the words "the costs of taking such verdict," did not mean the costs of trial; and that the fees of counsel and the costs of the attorney respecting the preparing for and attendance at the trial, were properly disallowed.

such costs as are usually allowed to the successful party in trials of civil causes in the Court of King's Bench. It ap-

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every case in which the verdict of a jury shall be given for a greater sum than shall have been previously offered by the said company, for the purchase of any lands to be used or taken by them for the purposes of this act, or as compensation or satisfaction for any damage or loss which may happen or arise in the execution of any of the powers hereby granted, all the costs of summoning such jury, and the expenses of witnesses, shall be defrayed by the said company; and such costs and expenses shall be settled and determined by the said sheriff, under-sheriff, coroner, or other person as aforesaid; and in case such costs and expenses shall not be paid to the party entitled to receive the same, within ten days after the same shall have been demanded, then the same shall and may be levied and recovered by distress and sale of any goods or chattels of the said company, under a warrant to be issued for that purpose by any justice of the peace for the county or place where such inquisition shall be held, not interested in the matter in question; which warrant such justice is hereby authorized and required to issue under his hand and seal, on application made to him for that purpose by any party entitled to receive such costs and expenses; but if the verdict of the jury shall be given for the same or a less sum than shall have been previously offered by the said company, one moiety of the said costs and expenses shall be defrayed by the party with

whom the said company shall have such controversy or dispute, and the remainder shall be defrayed by the said company; and the former moiety of such costs and expenses having been ascertained and settled in manner hereinbefore mentioned, shall and may be deducted out of the money adjudged to be paid to such other party as so much money advanced to and for his use, and the payment or tender of the remainder of the money so adjudged shall be deemed and taken, to all intents and purposes, to be a good payment or tender in satisfaction of the whole thereof: Provided always, that in cases in which, by reason of absence in foreign parts, or from any other cause or disability not hereinbefore provided for, any person shall have been prevented from treating and agreeing as aforesaid, the whole of such charges and expenses shall be borne and paid by the said company."

Section 72, enacted, "that all parties with whom the said company shall have any dispute, shall, at their own costs, before the said company shall be obliged to issue their warrant for the summoning of such jury, enter into a bond, with two sufficient sureties, to the said company, in a penalty of 100*l.*, to prosecute their complaint, and to bear and pay their proportion of the costs and expenses of summoning and returning such jury and taking such verdict, and of the summoning and attendance of witnesses, in case any part of



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peared that the North Union Railway Company requiring certain lands belonging to *Norreys*, served him with notice to that effect. Negotiations for the purchase commenced, but in consequence of the company thinking Mr. *Norreys*' claim exorbitant, they were broken off, and no tender or offer of any sum was made by the company. An inquisition to determine the value of the land was taken under the above statute, before the defendant, as one of the coroners for the county of Lancaster. The bill of costs of *Norreys*' attorney for conducting the inquisition, including the fee of counsel, the expenses of certain surveys that had been made, and the expenses of the attorney in preparing the brief, attending the inquisition, and negotiating with the company, amounting to 34*l.* 7*s.* 4*d.*, was delivered to the defendant for his allowance, but he disallowed all those items, and only allowed the expense of the summoning and attendance of the jurors and witnesses, and so much of the expense of the surveys as was incurred with a view to the trial, amounting altogether to 63*l.* 5*s.*

*Cowling* now showed cause against the rule. The question of costs turns entirely upon the construction of the 71st and 72nd sections of this act. The words of the 71st section being precise and clear in limiting the costs to be defrayed by the company to the costs of summoning the jury, and the expenses of witnesses, cannot be controlled by the

such costs and expenses shall fall upon them; or in case the said company shall have thought fit to issue such warrant, without such bond having been previously entered into, it shall be lawful for the said company, in the said notice of the time and place at which such jury are to be returned as aforesaid, to serve as aforesaid, to give notice that a bond in the said penalty of 100*l.*, with two sufficient sureties, condition-

ed to bear and pay their proportion of the costs and expenses aforesaid, will be required to be entered into by the said parties to the said company before the said inquiry is commenced; and thereupon, unless such bond be given, the said parties so in dispute with the said company shall not be allowed to be heard, or to produce any witnesses at, or to take any part or share in the said inquiry."

words of the 72nd section, however different the language used in that clause may be. At the most the words in the 72nd section do nothing more than explain the words used in the former, and shew that they are not to be taken literally, and that the expenses of summoning the jury shall not be limited to the summons alone, but include also their attendance at the trial; and so of the witnesses also, the expense of summoning them is to be borne as well as that of their attendance. But the words, "the costs of taking such verdict," cannot have the meaning contended for by the other side, viz. the costs of trial; because then it would not have been necessary to specify the expenses of witnesses, which, of course, are implied in the term "costs of trial." In *Rex v. The Justices of the City of York* (a), the words used in the act were very different. The costs there given were the costs of the inquest, which was held to mean the costs of trial; here the words are, "the costs of taking such verdict," not "the costs of such verdict," and still less "of such trial;" and therefore cannot mean the costs of trial; besides, the words in that act were all in the same section. Here the second clause is made with a different view altogether, namely, to specify the security to be given to the company for the costs; and if that security is too extensive, it cannot affect the question as to what costs are to be allowed.

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The Court here called upon *Coltman*.

*Coltman* contra. The 71st and 72nd sections must be looked upon as if they were incorporated. And it is clear, from the terms of the 72nd section, that the costs to be defrayed by the losing party are to be one half of the total of the costs incurred; and therefore the case is very similar to *Rex v. Justices of the City of York* (a); and, indeed, the costs of taking the verdict and the costs of the inquest, are expressions very difficult to be distinguished. Terms in

(a) 3 N. & M. 685; 1 A. & E. 828.

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acts of parliament giving costs, have received a liberal construction: "the costs of the writ purchased," in the statute of *Gloucester* (a), have been expounded to give the whole costs of the suit. Besides, it is enacted by s. 66, that in all cases where there is an inquiry before a jury, the person claiming compensation shall have the same rights as a plaintiff in an action at law. One of the rights of a plaintiff at law is to have full costs if he is successful. [*Littledale J.* You would contend then, on the 71st section alone, that the plaintiff is entitled to full costs, but in that case do you consider the 72nd section as enlarging or abridging the 71st?] It is submitted that the 72nd makes the two sections consistent one with another, and that it would be idle to require a bond to be given for more than was to be paid.

Lord DENMAN C. J.—I have no difficulty in saying, that if there were any words which would at all justify our allowing the fee to counsel, and the costs of the attorney in conducting the inquiry, I should have no hesitation in giving them a liberal construction; and I think it very unjust that those costs are not provided for by the act of parliament. But if they are not provided for by the act, we cannot supply the deficiency. Now by the 71st section,—[His lordship here read the two paragraphs in the 71st and 72nd sections relating to costs,]—in providing for the particular expenses that shall be paid, it seems to me that the words evidently fall short of the construction sought to be put upon them. In the case of *Rex v. The Justices of the City of York* (b), I do not think we strained the words used in the act at all, for the costs of the inquest certainly mean the same as the costs of a trial. Therefore I do not think we are departing from the principle laid down there, when we say that the costs now sought for cannot be granted under this act. Then as to the proviso that the party

(a) 6 Ed. 1, c. 1, s. 2.

(b) 3 N. &amp; M. 695; 1 A. &amp; E. 828.

shall have all the rights of a plaintiff, although it is clear that one of the rights of a plaintiff is to have costs when he succeeds, I think those words, as used in this act, only apply to the mode of conducting the inquiry, to remove any doubts as to the party to begin, and not at all to the question of costs. I therefore think, with regret, that we are obliged to discharge this rule, and that in this particular the interests of the public have not been attended to.

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LITLEDALE J.—I entirely concur. It is not a universal rule that a plaintiff who succeeds is to have costs, as that depends on several statutes, which are to be applied in each particular case. I very much regret to have to draw a distinction between this case and *Rex v. The Justices of the City of York*(a), where the words are something similar; but if different language is used by the legislature, it gives rise to the belief that different matters were intended, and a construction must be given by us according to the language used. Now the act, in that case, provided that the costs of the notice and precept, and of the said inquest, should be paid by the trustees; but in the act in this case there is nothing said about the expenses of notices or precepts; and the expression relied on for giving costs, “taking a verdict,” is very peculiar. If the question had stood upon the 71st section alone, there could be no doubt that the coroner has no power to tax these costs; and on looking at the 72nd section, I see nothing in the language to warrant the more extended construction sought to be put upon it.

WILLIAMS J.—If there had been any generality of expression as to costs in the act, I should have been disposed to apply the construction Mr. *Coltman* has pointed out; but unfortunately the words of the act are express in pointing out two particular expenses which are to be defrayed; the

(a) 3 Nev. & M. 685; 1 A. & E. 828.

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expression of which excludes the idea of any further expenses being intended to be contained in the terms used.

COLERIDGE J.—Mr. *Coltman's* argument could not be stronger than to suppose the 72nd section was incorporated with the 71st, and that we were asked to give the expenses on the strength of the words, “the expenses of taking a verdict;” but, joined as these words are with the words “the expenses of summoning juries and the attendance of witnesses,” it would be impossible to say they mean the same as the costs of the trial, and the more so as they have not that meaning of themselves. With regard to the full effect which has been given to the words “writ purchased,” in the statute of *Gloucester*, old acts of parliament were so short, and modern ones are so full, that there is no analogy between them in the exposition to be given.

Rule discharged.

Friday,  
 Jan. 13th.

THE KING v. MASHITER.

- 1.** To entitle a party to an information in the nature of a quo warranto, on the ground that the person filling the office has not been elected by a majority of the class entitled to vote, the relator must shew who the class are that are entitled to vote, and that another person had a majority of such votes.
- 2.** Thus, where a charter of *Edw. 4.*, granted to the tenants and inhabitants of the manor of H., (which was of ancient *demesne*,) that the justice of the peace for the manor should be chosen by the said tenants and inhabitants: Held, that a relator, who claimed to be elected by a majority of the inhabitants, (without giving any construction to the word “inhabitant,”) had not made out a *prima facie* case to entitle him to the writ.
- 3.** The word “inhabitant” has no definite legal meaning, but is to be construed according to the subject-matter with which it is connected.
- 4.** *Semble*, the grant to the tenants and inhabitants of a manor of various privileges, such as the right not to be impleaded out of the manor, the right to elect a justice of the peace, the grant of a fair, of a court of pie poudre, &c., does not, by its context, shew that the word “inhabitants” means all who have come into the manor *animo morandi*.

Havering-atte-Bower, in the county of Essex, upon the ground that *Edward Young Hancock* had the majority of legal votes over the said defendant, and ought to have been declared to be duly elected a justice of the peace for the said manor, instead of the defendant.

The rule was obtained upon the affidavit of *E. Y. Hancock*, the relator, which stated, that he was an inhabitant of the manor of Havering-atte-Bower, and that by a charter of *Edw. 4.* (which was set out,) reciting, that the manor of Havering was of ancient demesne of the crown of England, his said Majesty did grant, amongst other privileges, to the tenants and inhabitants of the said manor, and to their successors, that the steward of the manor, and one of the discreetest and honestest tenants or inhabitants aforesaid, to be from time to time chosen by the tenants and inhabitants, and their successors, should be justices of the peace within the manor: that this charter was afterwards confirmed by several kings and queens of England, and was still in force: that at a court of ancient demesne, held February 11, 1836, in pursuance of the charter, before the steward and *A.* and *B.* as suitors, the defendant being an inhabitant of the manor, and the deponent, were severally nominated to the office of justice of the peace for the said manor; and that a show of hands, which was called for, was declared by the steward to be in favour of the deponent; a poll was thereupon demanded by the defendant, which was ordered to be taken on the 15th and 16th days of February following: that at that poll several persons claimed to vote as inhabitants of the said manor, but their votes were rejected by the steward, on the ground of their not being householders: that at the close of the poll there were 341 votes recorded in favour of the deponent, and 455 in favour of the defendant: that, in addition thereto, 218 persons claimed to vote, all of whom, in the belief of the deponent, were inhabitants of the manor, though not actual householders therein; and that 170 of such persons tendered their votes for the deponent, and 48 for the defendant; so that had all these votes been received on either side, the deponent would have had

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a majority of eight votes over the defendant. The affidavit then stated an application by the deponent, at the next court of ancient demesne of the manor, to be sworn in as one of the justices of the peace for the said manor; but that the court, notwithstanding this notice, swore in the defendant as such justice. The deponent then stated, that by inquiry into the usages of the manor, there did not appear to be any instance of a poll having been taken at any previous election for justice of the peace, but that the courts of ancient demesne, at which the elections of justices were always made, had been open to and attended by the tenants and inhabitants of the manor, without any objection or distinction, whether the same were householders or not; and that by certain books kept by the keeper of the records for the manor, four instances only of any election of justices of the manor were recorded; viz., on the 28th January, 1768; 15th May, 1794; 4th January, 1809; and 10th February, 1825.

The entries of these elections were then set out, at none of which did there appear to have been any contest. The entry of the 15th May, 1794, was as follows:—

Election of  
15th May,  
1794.

“ Liberty of Havering-atte-Bower, { At a meeting of the te-  
in Essex. nants and inhabitants of  
the said liberty, held this fifteenth day of May, 1794, at the Court-house in Romford, for the purpose of electing a proper person as chief magistrate for this liberty, in the room of *R. B.*, resigned, before *T. G. F.*, Esq. deputy steward of *E. H.*, Esq. High Steward of the said liberty and manor of Havering-atte-Bower aforesaid, and before the bailiff of the said manor:

“ We, the tenants and inhabitants of the liberty aforesaid, whose names are hereunto subscribed and set, do hereby unanimously nominate and appoint *R. N. H. N.*, Esq. chief magistrate of the liberty of Havering-atte-Bower aforesaid.” To this 104 signatures were attached.

Election of  
4th Jan. 1809.

The entry of the election of the 4th January, 1809, was nearly in the same words, with 73 signatures attached.

The affidavit then proceeded to state that several of the persons (particularizing them) whose names appeared attached to the entry of 1794, although inhabitants of the manor, were not, in the belief of the deponent, and it was notorious in the manor that they were not, either tenants of the manor, or householders therein; and that *John Tyler*, one of the said persons whose name appeared to the entry of May, 1794, had informed the deponent, that at the time of that election he resided with and formed part of the family of his father, and that he was not at that time a tenant or householder within the manor, but that he remembered voting at the election. There were similar statements as to other individuals, whose names were entered, and who had informed the deponent, that at the time of the election in 1794, they were not tenants or householders within the manor, but were residing with their parents within the manor.

The same statement was made as to several persons, whose names appeared to the entry of 4th January, 1809.

There was another affidavit, by two old inhabitants of the manor, who remembered the elections of 1794 and 1809, confirming the statement in *Hancock's* affidavit, as to the individuals therein particularized not being at the time of the election tenants or householders within the manor.

The preamble of the charter of the 5 *Edw.* 4, was as follows:—

“ Know ye, that whereas the lordship or manor of Haver-  
ing-atte-Bower, in the county of Essex, is of ancient demesne  
of the crown of England; and all the lands and tenements  
holden of the same manor, and real and mixed actions in,  
upon, and concerning the same lands and tenements, or any  
parcel of them, arising or to arise, are pleadable, and have  
been pleaded, in the court unto the said manor belonging,  
before the steward and suitors of the same court for the  
time being, and not elsewhere; and have ever been ac-  
customed, since the time whereof no memory of man is to

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the contrary, in the same court to be pleaded and determined as of all other lands holden in ancient demesne, time out of mind, ought and is accustomed to be done; and now having heard, by the lamentable complaints of the tenants and inhabitants of the said lordship or manor, in what sort they have been, and now are, out of the said lordship, in other courts than in the aforesaid court, before the steward and suitors of the same, in and concerning divers actions and plaints of and upon divers lands and tenements, which heretofore have risen, and daily do arise or happen, within the said lordship, many times by their Ill-willers troubled, vexed, grieved, and molested, to the no small loss and grievance of them the said tenants and inhabitants, and to the hazard of their utter undoing, unless they be by us relieved in this behalf, whereupon they have been humble petitioners unto us, that we would provide remedy for them in the premises."

The charter then contained a grant to the above-named tenants and inhabitants, and that they should not be compelled to answer before any of the King's judges, in any real, personal, or mixed actions, arising or to arise, of, in, or upon the lands and tenements aforesaid, holden at that aforesaid manor, in any other courts than in the court of the manor, and that all actions of debts, trespasses, &c. arising in the manor, were to be tried there. It then contained this grant: "We have granted, and by these presents do grant, unto the aforesaid tenants and inhabitants, and to their successors, that the steward of the said manor for the time being, so long as he shall continue in the same office, and one of the discreetest and honestest tenants or inhabitants aforesaid, to be from time to time chosen by them, the tenants and inhabitants, and their successors, shall be for us and our heirs, justices of the peace, and keepers of our peace, to be kept within the said manor of Havering aforesaid." There was also a grant of a fair, and of a court of pie poudre, to the tenants and inhabitants

aforesaid, their heirs and successors; and the charter concluded thus: "And furthermore we will, and by these presents do grant unto the same tenants and inhabitants, their heirs and successors, that they shall be able persons, and capable in the law to receive, have, and accept, all and singular the privileges, liberties, and authorities and franchises aforesaid, and the same to enjoy, and then, &c., notwithstanding that there is no express mention made in these presents of the yearly value of the premises, or any statute, act, ordinance, or provision to the contrary, made, ordained, set forth, or provided, notwithstanding."

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Sir *W. W. Follett* now shewed cause. The question turns upon the meaning of the word "inhabitants," in the charter of *Edw. 4*. The manor being of ancient demesne, there is a grant to "the tenants and inhabitants" of the said lordship or manor, of several privileges. The tenants of the manor being all tenants in ancient demesne, it may be contended, from the nature of the privileges granted, that inhabitants must be construed to mean inhabitants being tenants, as in *Fearon v. Webb* (a), where a grant to parishioners and inhabitants, was construed to be to parishioners being inhabitants; but at all events, "inhabitants" must be construed to be occupiers within the manor. There are several authorities to shew, that where the word "inhabitants" is used in ancient charters, it is never explained by mere inhabitancy. There is no decision in the books, giving to the word any full and definite meaning, like the word "heir," which requires to be cut down to a more limited sense, by an express demonstration of intention; but it is to be construed always *secundum subjectam materiam*.

First point:  
 Inhabitants in  
 old charters do  
 not include  
 non-occupiers.

Sir *E. Coke* (b), commenting on the statute of bridges, says, that "the word 'inhabitant' is the largest word of the kind; for although a man be dwelling in a house in a foreign county, riding, city, or town corporate, yet if he hath lands or tenements

(a) 14 Ves. jun. 13.

(b) 2 Inst. 709.

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in his own possession and manurance, in the county, riding, city, or town corporate, where the decayed bridge is, he is an inhabitant, both where his person dwelleth, and where he hath lands or tenements in his own possession, within this statute." That was a statute throwing a pecuniary burden on the inhabitants of a county; and the obvious exposition of the word there is, persons having property in possession in the county. The meaning of the word 'inhabitant' was much discussed in *Rex v. Adlard* (a), on the liability of a non-resident occupier to serve as constable, on the ground of his being an inhabitant; and it was there held that Lord Coke's exposition of the word did not apply to the case. It would also seem, from *Abbott C. J.*'s judgment, that no person is liable to serve as constable, unless he is an occupier as well as resident within the parish. In many old deeds, a power of electing the clergyman of the parish has been given to "the parishioners and inhabitants," as in *The Attorney-General v. Parker* (b); but inhabitants has never been held to include any but occupiers, the lowest class of whom are householders, and the limitation has been applied that it includes householders only bearing parochial burdens; *Attorney-General v. Forster* (c).

The right given in the charter is to elect a justice of the peace. The contemporaneous exposition of the word 'inhabitants,' at the time of *Edward the Fourth's* charter, may be found in the class of persons by whom so many public officers at that time were chosen, namely, in freeholders, by whom only, the coroners of a county, members of the House of Commons, &c. were chosen. [Lord *Denman* C. J. Is that so? the statute 8 *Hen.* 6, c. 7, in limiting the right to freeholders to elect members of parliament, does not say a word about any but freeholders having the right before.] It is apprehended that it was a usurpation for any but freeholders to vote before that statute, certainly none

(a) 7 D. & R. 340; 4 B. & C. 772. (c) 10 Ves. J. 335.

(b) 3 Atk. 576; S. C. 1 Ves. sen. 43.

but freeholders ever voted for the coroner. There is no case in which the word 'inhabitants' has ever been held to include more than occupiers. [*Littledale J.*—Suppose the crown had granted a charter to the inhabitants of the parish of A., who would be the parties to take?] It is apprehended the occupiers within the parish. When a grant of that kind has been held to extend to occupiers, it has often been restricted to occupiers paying scot and lot. There was a case in *Bosanquet* and *Puller's Reports* (a), in which the question arose, as to the exemption of a citizen of London from toll; and it was held, that a citizen was not exempt, unless he was resident, and an occupier in scot and lot (b).

II. But it is for the relator to shew what the meaning of the word is. Before he is entitled to his quo warranto, he must make out who the inhabitants within the manor are, and that he has a majority of such inhabitants. He has sworn that several persons claimed to vote, all of whom, he believed, were inhabitants of the manor, though not householders therein. But what light does this give to the Court as to the meaning of the word 'inhabitants' in the charter. Does the relator mean by it all who have resided in the manor for a year, or for a month, or would he include a regiment of soldiers, who were marched into the manor the night before the election? for they also, in the fullest sense of the term, would be inhabitants, and as such are understood

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Second point:  
 The relator is  
 bound to put  
 a construction  
 on the word.

(a) Probably *The Corporation of London v. The Corporation of Liverpool*, cited in note to *Mayor of London v. Mayor of Lynn*, 1 B. & P. 522. See also *Lib. Ass. fo. 227*, in which it was contended that a non-resident landowner in London was entitled to the privileges of a citizen, but it was held that "citizens" only included those who were born and inheritable in the city, by descent of heritage, and who were residents and taxable to scot and lot.

(b) It would appear from the terms of the charter of *Edw. 4*, that the words "tenants and inhabitants" were clearly not intended to include any but occupiers, as the last clause (see *ante*, 319,) confirms to the tenants and inhabitants "all the privileges granted, notwithstanding that there is no express mention made in these presents of the yearly value of the premises." Now the only premises mentioned in the charter are the lands and tenements of the tenants and inhabitants.

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to have voted formerly at Preston (a). Does he include also servants and children? for they, too, are inhabitants. In the comment on the statute of bridges, which will perhaps be relied on by the other side, where Lord *Coke* says, inhabitants is the largest word of the kind, he adds, "that servants are not within the statute;" but it is not shewn to the Court here whether they are within the charter or not. A body of persons, coming into the manor for the express purpose of voting, are in one sense also inhabitants. So are beggars within the manor; and if the relator's claim can be established, a beggar may be a justice of the peace; for no other qualification is required from the justice than from the electors. If any of these expositions of the term had been made on the other side, an answer could have been given to shew that none of them were right; but the relator has left the matter where it was, or explained *obscurum per obscurius*. There is in fact no legal meaning to the word 'inhabitants;' and whether it means occupiers within the manor, resident occupiers, or residents only, the relator ought to have shewn himself to be elected by the majority of one of such classes, before he can apply to this Court.

**Second point.** *Thesiger* contra. It is admitted that it is necessary to shew what kind of inhabitancy in the manor of Havering entitles persons to the benefits of the charter, and that has been done here, as it clearly appears from the affidavits that the contest is, whether the inhabitants need be householders or not. The Court are now to decide whether such a qualification attaches to the term. Only four instances have been recorded of elections of justices of the peace, and it is sworn that the court of ancient demesne, where the elections are held on all such occasions, was always open to all inhabitants. Lord *Eldon*, C., in the *Attorney-General v. Forster* (b), said of the word 'inhabitants,' "No words are more capable of a larger or more limited inter-

(a) This case was put in argument in the *Preston* case, before the House of Commons, in 1785. See 3 *Luders*, 229.

(b) 10 *Ves. jun.* 339.

pretation;" that is, no words are more capable of being acted upon by usage. And in the *Attorney-General v. Parker* (a), Lord *Hardwicke*, C. said :—"Inhabitants is still a larger word (than parishioners), and takes in housekeepers, though not rated to the poor; takes in also persons who are not housekeepers, as, for instance, such who have gained a settlement, and by that means become inhabitants." He then goes on to say, "In the construction of ancient grants and deeds, there is no better way of construing them than by usage, and *contemporanea expositio* is the best way to go by." If, therefore, there were any contemporaneous usage to restrict the use of the word, as in the *Clerkenwell* case, it might prevail; but the usage here, as far as it goes, shews, that the full sense of the word has always been given to it. So *Lawrence J.* said, in *Withnall v. Gartham* (b), "The argument of convenience from this or that construction of a deed creates that sort of ambiguity that should be explained by referring to usage. So Lord *Hardwicke* thought in the case of the *Attorney-General v. Parker*, where great inconvenience would have arisen from construing the word 'inhabitant' in its full sense (c)." It is submitted here, that the residents within the manor of Havering are entitled to construe it in the full sense. [*Cole-ridge J.* What do you contend is the full sense to be given to the word 'inhabitant' ?] Every in-dweller; every one who comes into the manor *animo morandi*, as in the case of the borough of Preston formerly, and *The King v. Woolpit* (d). [*Littledale J.*—You would include then under the term women, children, and servants.] There seems to be

(a) 3 Atk. 576; & C. 1 Ves. sen. 48.

(b) 6 T. R. 398.

(c) Mr. J. *Lawrence* appears to have mistaken the effect of the Lord Chancellor's decision in the *Clerkenwell* case, as Lord *Hardwicke* thought that in the absence of usage a limitation ought to be put upon the word "inhabitant,"

but he felt himself bound by the usage to extend it to householders. In the report in 3 Ves. sen. 43, he stated, that in *The Attorney-General v. Davey*, where there was no proof of usage, he held that "inhabitants" should be limited to householders assessed to the poor.

(d) 5 Nev. & M. 526; 4 A. & E. 205.

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much reason for so doing, as the jurisdiction given in the charter extends over servants. In the *Attorney-General v. Parker* (a), the *Attorney-General v. Forster* (b), and the *Attorney-General v. Newcombe* (c), which are different stages of the *Clerkenwell* case, a controlling usage was shewn to limit the meaning of the word, which the Court felt bound to give effect to.

It is important to look at what is granted by the charter. First, the right of not being drawn away to be impleaded in other Courts. This must apply to inhabitants who are not tenants in ancient demesne, as the latter had the right without the charter. Then a Court is established with jurisdiction, not only over real, but over personal actions; then the justice of the peace is to have the same power as any other justice of the peace; and then a fair is to be held. It is evident that all these provisions were not intended to apply to tenants in ancient demesne only, as they are calculated for the benefit of the whole population.

It is remarkable, that in speaking of courts leet, Lord *Coke* uses the terms 'tenants and resiants' in the same manner as tenants and inhabitants are used in this charter.

Anciently, before the grant of courts leet, all tenants and resiants were obliged to do service at the sheriff's tourn; and Lord *Coke* says (d), "It hath appeared before, that of ancient time the sheriff had two great courts, viz. the tourn and the county court: afterwards, for the ease of the people, and specially of the husbandmen, that each of them might the better follow their business in their several degrees, this court here spoken of, viz. view of frankpledge, or leet, was by the king divided and derived from the tourn, and granted to the lords, to have the view of the tenants and resiants within their manors &c., so as the tenants and resiants should have the same justice that they had before in the tourn done unto them at their own doors, without any charge or loss of time."

(a) 3 Atk. 576; 1 Ves. sen. 43.

(b) 10 Ves. jun. 339.

(c) 14 Ves. jun. 1.

(d) 2 Inst. 71.

So, it is contended here, the court given by the charter was intended to give the same advantage to the tenants and inhabitants, as the court leet to tenants and residents. And it will be observed, that *Coke* mentions husbandmen particularly as those for whom the benefit was intended. Inhabitants, therefore, ought to have the full sense attributed to it, unless it can be shewn to be qualified by the context, or by long usage. And this limitation should be shewn by the other side. It is said, there is no case in which the full sense has been given to the word, but that is not so, for it has been held (a), that if the queen by her charter were to grant land to the good men of Islington, that would make them a corporation. In *Co. Litt.* 3 a, it is said the parishioners or inhabitants of Dale are not capable to purchase lands, but goods they are. In *Russell v. The Men of Devon* (b), an action on the case was brought against the men dwelling in the county of Devon: and Lord *Coke*, 4 *Inst.* 297, says expressly, "and concerning claims, it is specially to be observed, that by the forest law, a grant made of a privilege within the forest to all the inhabitants, being freeholders within the forest, or such other commonalties not incorporated, is good."

In all these cases, these general words appeared to be understood, and to be thought capable of a legal construction.

Lord DENMAN C. J.—I should be unwilling to decide that this rule must be discharged on the ground that the inhabitants mentioned in the charter of *Edward 4*, must be occupiers within the manor, as I am not prepared to arrive at that conclusion. But the construction of the word does not arise now. To warrant an information in the nature of a quo warranto, against a party for filling an office, it must be shewn clearly to the Court that the right to be elected

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(a) *Dyer*, Rep. 100 e. It was held in C. P., 7 *Edw.* 4, 14, that if the King grant lands in fee, *probiis hominibus villæ de Dale*, the incor-

poration would be good; and so if it were *burgensibus, civibus et communitati*.

(b) 2 T. R. 667.



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to that office exists in some other person who has been chosen by a majority of legal votes, and in this case Mr. *Hancock* is stated to have had the votes of several inhabitants of the manor tendered for him, which votes would have given him a majority over the defendant, if they had not been rejected; and the ground of his application is, that these were inhabitants entitled to vote under the charters of the manor. But the term 'inhabitant' is so very large and uncertain in its meaning, that Mr. *Hancock* should have made out to the court, what the construction of the word is under these charters, and then he should have shewn that he had a majority of those persons whom he includes within the term. This he has not done.

I think also there is a complete failure to make out that the term 'inhabitants' has any definite legal meaning, for although Mr. Justice *Lawrence* (a) mentions the full sense of the word, he does not say what that is, and there is nothing to shew that he had formed in his mind any definite idea of the meaning to be given to it. So, the case of *Russell v. The Men of Devon* (b), which has been cited for the relator, appears rather to make against him, as Lord *Kenyon* certainly seems to have thought that the word 'inhabitant' was one of very uncertain application.

LITLEDALE J.—I think it is a very difficult proposition to make out what the legal meaning of the word 'inhabitant' is. Under the Statute of Bridges, it means any one having lands in possession in the county; in another case it means all who are rated to parochial burthens within a parish; and in another it means all who happen to be in a parish, for any purpose whatever, as in the case of a way to a church. In short, it must be always construed with reference to the subject-matter in which the word is found. I therefore think it has no fixed meaning, and, in my opinion, Mr. *Thesiger* has completely failed to shew what its meaning is, as used in these charters. I put a question to him

(a) *Withnall v. Gartham*, 6 T. R. 398. (b) 2 T. R. 667.

during the argument, on his citing *The King v. Woolpit* (a), whether it included lodgers, children, and servants, and his inability to answer that question shews the difficulty there is in explaining what is called the full sense of the word.

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WILLIAMS J.—I am of the same opinion. The Court ought not to disturb the defendant in his office, unless sufficient grounds were shewn for drawing a conclusion that he was not properly elected. This ought to be made out, either by shewing that the word ‘inhabitant’ has a definite meaning, or what the claims of the parties were who voted for the relator. The word ‘inhabitant’ has not any such definite meaning, as is clearly shown by the exposition of the term, as it is used in the Statute of Bridges. There is, therefore, no ground for coming to a conclusion that any other person than the defendant has a legal majority. Nor are there any facts that can be gathered from the affidavits, tending to shew what the construction is which is to be put upon the word ‘inhabitants.’

COLERIDGE J.—I take it to be quite clear, that before a rule for a quo warranto information can be made absolute, the party applying for it must shew a *prima facie* case. The question is, has that been done here? It is contended for the relator to have been made in one of two ways. First, that the word ‘inhabitant,’ in the absence of any controlling usage, has a certain legal meaning, which, if it could be established, would, perhaps, be a good title to the writ. But I think, if any lawyer were asked the meaning of the word ‘inhabitant,’ he would inquire where and how the word was used, for that by itself it has no established meaning. The relator, therefore, fails on that ground. But, second, it is contended, that it can be perceived by the context in the charter, that it means every person coming into the manor *animo morandi*. If that is the meaning of inhabitants, it ought to have been shewn on the affidavits that the relator had a majority of persons who had come into the manor

(a) 5 Nev. & M. 526; 4 Ad. & E. 205.

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*animo morandi*; but that has not been done. I do not, however, agree that the language of the charter shews that that is the right exposition to be given to the word. In either way, therefore, the relator has failed to make out a *prima facie* case.

Rule discharged (a).

(a) See the following case.



1. Where a charter of *Edw. 6* granted to the governors of a corporation the right of nominating and appointing *undecum assensu majoris partis inhabitancium* of the vill of S. a chaplain to perform divine service in the said vill:—Held, that a usage for the governors to nominate a chaplain, and to give notice to the inhabitants to meet at a future day, and to assent or dissent to the nomination so made, was not inconsistent with the words of the charter.

The KING v. The Governors of SANDFORD (b).

BY a charter of *Edw. 6*, after reciting that as well for the increase of divine worship and the better preservation and governance of the goods, chattels and hereditaments of the parish church of Crediton, otherwise called Kyrton, in the county of Devon, then being and thereafter happening to be and for the instructing of children, as also for other causes, &c., his majesty granted to the inhabitants of the said parish, that from thenceforth there should be within the same parish, of the inhabitants of the same for the time being, twelve governors of the hereditaments and goods of the church of Crediton, otherwise called Kyrton, of the which governors his majesty willed that three should be always of the village or hamlet of Sampford (which is now a parish by reputation under the name of Sandford), and he incorporated these governors, and granted to them a perpetual succession and a common seal. The charter (which was in Latin), after enumerating various duties of the governors with reference to other matters, proceeded as follows:—

(b) This case was argued on been placed after *The King v. Jan. 30th* in this term, but has *Mashiter* on account of its subject.

2. A decree by the Lord Chancellor, in 1741, had declared the right of voting to be in the inhabitants only paying rates and assessments, and the usage since that decree had been in accordance with it, an election having been made by such inhabitants, at which the votes of non-rated inhabitants were tendered and refused; the Court refused to grant a mandamus for a new election, as the parties applying for it had made out no case to shew that the term "inhabitants," used in the charter, had a wider signification.

“ Et volumus, ac per præsentēs declaramus et ordinamus, quod illi tres dictorum duodecim gubernatorum qui ex parte villatæ de Sampford prædictæ de tempore in tempus fuerint *unâcum assensu majoris partis inhabitancium* ejusdem villatæ de Sampford nominabunt et appunctuabunt ac nominare et appunctuare valeant et possint unum capellanum ad divina servicia ac sacramenta et sacramentalia ministrandum in capellâ de Sampford prædictâ *pro inhabitantibus* villatæ et hameletti de Sampford prædictæ et per illos tres dictorum duodecim gubernatorum qui ex parte villatæ et hameletti de Sampford prædictâ *unâcum assensu prædictæ majoris partis inhabitancium* ejusdem villatæ et hameletti de Sampford de tempore in tempus pro rationabili causâ expellatur et amoveatur, et alius ejus loco per eos ponatur.”

Sir *Humphrey Phineas Davie*, bart., *William Harris*, and *Elias Tremlett*, are the three governors at present of the village or hamlet of Sandford. Upon the death of the Rev. *Hugh Bent*, the last chaplain of Sandford, the above-mentioned three governors, without the assent of the major part of the inhabitants of Sandford, nominated the Rev. *Charles Gregory* to be the chaplain of Sandford, and caused the following notice to be fixed on the door of Sandford church:—

“ We, the undersigned *Humphrey Phineas Davie*, bart. and *William Harris* and *Elias Tremlett*, gentlemen, all of the hamlet of Sandford, in the county of Devon, being the three of the twelve governors, &c., do hereby give notice to the inhabitants of the said ville or hamlet that we have nominated the Rev. *Charles Gregory*, of Crediton aforesaid, to be the chaplain to perform divine service in the chapel of Sandford aforesaid, in the room of the Rev. *Hugh Bent*, late of Sandford, clerk, deceased: And we do hereby give notice to the said inhabitants to meet in this chapel on Sunday, the 26th June inst., immediately after the evening service, in order that they, or the major part of them, who shall be present at such meeting, may assent or dissent to

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such nomination. Given under our hands the 18th June, 1836."

Several of the inhabitants of Sandford objecting to this mode of election, employed Mr. *Gidley*, an attorney, to attend at the election on their behalf. The governors also appeared with Mr. *Smith*, another attorney, as their clerk. One of the governors was then called to the chair, and the business was conducted by the names of the resident rate-payers being called over, and upon each answering to his name, he or she was asked by Mr. *Smith*, "Do you assent or dissent," and the answer was taken accordingly. When this list was got through, the proceedings were about to be closed, when Mr. *Gidley*, on the part of certain of the inhabitants, stated to the chairman that two other classes of the inhabitants had not been called, namely, the non-resident rate-payers and the non-rated residents; whereupon he tendered five inhabitants to declare their dissent from the nomination of the governors, who were of full age, but who were not rated; and he stated that there were many more inhabitants present similarly circumstanced, who were ready to state their dissent, and he wished them to tender their votes for that purpose. The chairman, however, refused to receive these votes; and Mr. *Smith* afterwards, by the authority of the chairman, declared that the numbers were—assents thirty-nine, dissents thirty-two, and that Mr. *Charles Gregory* was elected by a majority of seven. After these proceedings the inhabitants entered a caveat in the Registry of the Bishop of *Ereter*, and upon the three governors applying to the Bishop to license Mr. *Gregory* to the said chaplaincy, his lordship, upon hearing the parties, decided not to grant the license.

Sir *F. Pollock*, in Michaelmas term last, upon an affidavit by certain of the inhabitants, setting out the above facts, obtained a rule calling upon Sir *Humphry Phineas Davie*, bart., *William Harris*, and *Elias Tremlett*, being the three of the governors of the hereditaments and goods of the church of Crediton, otherwise called Kyrton, on the part of

the ville or hamlet of Sandford, to shew cause why a writ of mandamus should not issue, directed to them, commanding them, with the assent of the inhabitants of the said ville or hamlet, to nominate and appoint a chaplain to perform divine service in the chapel of Sandford aforesaid, in the room of *Hugh Bent*, clerk, deceased.

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The affidavits in answer to the rule, made by the clerk to the governors, the three governors, the vestry clerk, and several old inhabitants who remembered the election of 1771, hereinafter mentioned, set out the following circumstances:—That at the election of the Rev. *George Bent*, in 1771, a notice was given to the rate-payers to meet and assent to the nomination of Mr. *Bent* by the governors; that the rate-payers did meet and assent, and that though a great number dissented, yet a large majority having assented, Mr. *Bent* was declared duly elected and admitted; that at the election in 1814 the three governors nominated and appointed the Rev. *Hugh Bent*, and gave notice to the inhabitants to meet to assent or dissent, and the inhabitants being rate-payers did unanimously assent, and Mr. *Hugh Bent* was admitted; that at the election of Mr. *Gregory*, in 1836, the governors proceeded as in former elections; that none but inhabitant rate-payers had ever been called upon to assent or dissent, and the custom and usage was always understood to be for the three governors to nominate, and for the inhabitants paying rates to assent or dissent.

Usage at elections.

By the charters it appeared that the churchwardens of the hamlet of Sandford were to be chosen by the inhabitants, in the same manner as the churchwardens of the parish of Crediton, and it was distinctly sworn that the usage had been for none but inhabitants paying scot and lot to vote for chapelwardens.

Several decrees of the Lord Chancellor, made in proceedings in the Court of Chancery, from the year 1730 to 1741, in a suit touching the election of the chaplain of Sandford, were also stated.

One of the decrees, which was made on a rehearing of

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the cause, by Lord *Hardwicke*, on the 25th July, 1737 (a), declared that neither of the candidates for the office of chaplain, *Blackall* or *Lang*, the former of whom had been elected by two of the governors and a minority of the inhabitants, and the latter by one of the governors and a majority of the inhabitants, were duly nominated and appointed, and it among other things ordered, that the said three governors "should proceed to nominate a chaplain, and should thereupon give notice to the inhabitants of the village of Sandford, to meet on the Sunday se'nnight after such nomination, to assent or dissent to such nomination."

20 Jan. 1741. By another decree (b), after reciting (inter alia) the proceedings commenced in the Court of Chancery in 1731, and the above-mentioned other decrees, and that two of the three governors of Sandford had proceeded to nominate the Rev. *J. Vickery*, as chaplain, without notice to Sir *John Chichester*, who was the other governor of Sandford, and *Vickery* was thereupon admitted; the Lord Chancellor ordered and declared, that no notice having been given to Sir *John Chichester*, the nomination and appointment of *John Vickery* was null and void, and his lordship thereupon ordered the governors of Sandford to proceed to nominate a chaplain, with the assent of the major part of the inhabitants, according to the charter and the decree of 1737; and decreed further, "that the right of assenting or dissenting to such nomination was only in the inhabitants of the said hamlet, paying the rates and assessments for the poor and chapel within the said hamlet."

27th July, 1741. There was another decree (c), by which, after reciting that in pursuance of the above decrees, the said governors did proceed to nominate a chaplain, and

(a) In a suit of *The Attorney-General at the relation of Bremridge and other Inhabitants v. Sir John Davie and others, Governors.*

(b) In a supplemental suit between *Sir J. Chichester, Bart. and Read, Tremlett, the Governors and*

*Attorney-General.*

(c) *The Attorney-General v. Twelve Governors, Davie, and others.* This is the decree alluded to by Lord *Hardwicke*, in *The Attorney-General v. Parker*, 3 Atk. 576, and 1 Ves. sen. 43.

two out of the three concurred in nominating *William Barter* as chaplain, but the other governor refusing to concur, the two governors gave notice in writing to the inhabitants to meet to assent or dissent to such nomination. And that in pursuance of such notice, "all or much the greatest part of the inhabitants within the said hamlet of Sandford, who were payers or owners or occupiers of lands charged to the rates and assessments of Sandford," did meet and assent to the nomination of *Barter*, and that not one inhabitant present dissented, the Lord Chancellor declared he was of opinion that *Barter* was duly nominated and appointed, and that he should be admitted.

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Sir *W. W. Follett* and *M. Smith*, now shewed cause. The decision in *The King v. Mashiter* (a) is conclusive in the present case. It did not appear there, on the affidavits on which the rule for a mandamus was obtained, that any definite meaning was given by the parties applying for the rule, to the term "inhabitants." The same defect occurs in this case. It is not attempted to be shewn that the election that has taken place is not in conformity with the usage since the time of *Edw. 6*, and there is no suggestion of the mode in which the election should take place. Two points only need be considered now; first, what is the best mode of construing this charter; second, what is the meaning of the word "inhabitants."

I. The best exposition of the terms used in ancient charters, is the usage which has been observed respecting them. The first occurrence of the word "inhabitants" in the charter relates to the election of chapelwardens, and the usage has been always for the inhabitants only, paying rates, to vote for chapelwardens. The whole context of the charter shews, that by "inhabitants," those paying scot and lot, or as they are now termed rate-payers, were meant. The usage has been always for the three governors to nominate a chaplain, and then for the rated inhabitants to meet and assent

First point:  
 Charter to be  
 explained by  
 usage.

(a) *Ante*, 314.



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or dissent to the person so nominated. This manner of nomination is consistent with the terms of the charter. The governors and the inhabitants are distinct constituent bodies. The charter is not that the governors *and* inhabitants shall nominate and appoint, but that the governors, *together with the assent* of the inhabitants, shall do so. The construction is, that one body is to nominate, and *with* the assent of the other body, to appoint. This usage has been confirmed by the solemn decree of the Court of Chancery. All the questions as to the right and manner of election in Sandford, were litigated in that Court, from 1730 to 1741, and Lord *Hardwicke* C. pronounced a well-considered opinion as to the right, and also gave directions that the election should be conducted by the governors nominating a chaplain, and by the inhabitants subsequently signifying their assent or dissent thereto. The case is alluded to by Lord *Hardwicke* in *The Attorney-General v. Parker* (a). The decrees have been searched for in the registrar's book; and it appears by the decree of Jan. 20, 1741, that Lord *Hardwicke* decided that the right of voting was in the inhabitants only paying rates and assessments. The very same point was discussed there as here; depositions were read and witnesses examined, whose testimony would tend to establish the usage a very long time back. There is therefore a strong case of usage as to the meaning of the term "inhabitants." The construction put by the Court of Chancery on the word, has been in other cases the same. The *Clerkenwell* case, where the point arose, was before the Court several times (b). Lord *Eldon* C. said, where a term like this was capable of receiving a great variety of explanations, it might receive a construction by usage. Here, the usage has been uniform.

Second point:  
 Some restriction must be put upon "inhabitants."

II. It is needless to refer to *Rex v. Adlard* (c) and

(a) Cited in 3 Atk. 576, by the name of *Attorney-General v. Dovey*; S.C. 1 Ves. 43.

(b) *Attorney-General v. Parker*, 3 Atk. 576,

(c) 7 D. & R. 340; 4 B. & C. 779.

other cases, to show that an inhabitant, in cases of this kind, means an occupier; as it is for the other side who seek to disturb the election, to shew the Court who compose the class by whom the election should be made. It is clear the word "inhabitants" must receive some restriction. The governors, acting in conformity to the usage and the decrees before referred to, have selected a class, viz. the rated inhabitants; and it lies on those who object to the selection, to shew what class they would substitute for the rate-payers. If the objection be, that if the right of voting is confined to the rate-payers, then the non-resident rate-payers ought to have been called on to vote; the answer is, that that question does not arise upon the present election. It distinctly appears that only five persons were present at the election whose votes were refused; and Mr. *Gregory's* majority being seven, those persons, if they had all voted against him, could not have turned the election. With regard to those who were not present to assert their claims, Lord *Eldon C.* said, in the *Attorney General v. Foster (a)*, he did not think the mere absence of persons not making any inquiry nor attending to vote, an objection that ought to destroy the election.

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Sir *F. Pollock* and *Rogers*, *contra*. It is clear from the terms of the charter that the inhabitants were to have an equal share in the election with the governors. The governors are to nominate and appoint unâcum assensu inhabitancium; which shows that there is to be a unity of persons and of times when and by whom the nomination and appointment are to be made, and that the inhabitants are to take an equal share in the nomination as well as in the appointment. Any usage therefore which may be relied on giving the nomination to the governors, and the mere power to dissent to the inhabitants, cannot be supported, because it is directly contrary to the words of the char-

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 The inhabitants  
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ter (a). But, in truth, there is no old usage in this case ; for although it has been said that the depositions before Lord *Hardwicke* must have shewn what the usage was at least a century and a half ago, in his mention of that case in 1 *Ves. sen.* 43, his lordship expressly said, that there was no proof of any usage. It is admitted that the usage has been in conformity with Lord *Hardwicke's* advice since that time ; but the points now raised were not then brought before the Court. The question, which led to the first decree was, whether an election by a majority of governors and a majority of the inhabitants was sufficient ; and in the second, whether a nomination by two of the governors only, where the third had not notice, was good ; it is clear, therefore, that any opinion expressed by Lord *Hardwicke* as to the mode of election, by the governors nominating and the inhabitants assenting or dissenting, or as to the meaning of "inhabitants," was extra-judicial, these points never having come before him to be decided. In *The Attorney-General v. Newcombe* (b), Lord *Eldon* C. said, "Lord *Hardwicke* thought, if I may presume to say so, very wisely, that sitting here to determine upon the validity of that election, he was not to state rules and regulations for the future conduct of a parish." Lord *Eldon* did not know that Lord *Hardwicke* had laid down such rules, obiter, in another case ; but he clearly thought his lordship had no right so to do.

Second point.

Again, the context of the charter shows that the limited meaning attempted to be given to the term "inhabitants" is not the correct one ; as the object of the grant was to provide for the performance of divine service for the inhabitants at large ; and it cannot be contended that inhabitants only paying scot and lot were to partake of this benefit. There is no instance in which "inhabitants" occurring in a charter previous to the 43 *Eliz.* which

(a) See *Rex v. Williams*, 2 M. & S. 141 ; *Rex v. Varlo*, Cowp. 248 ; *Rex v. Miller*, 6 T. R. 248 ; *Rex v. Bird*, 13 East, 367. See also

*Rex v. Philips*, 1 Str. 394 ; *Morgan v. Palmer*, 2 B. & C. 729.

(b) 14 *Ves. jun.* 1.

originated parochial rates, has been limited to mean rate-payers; now this charter was granted 1 *Edw.* 6, therefore upwards of fifty years before 43 *Eliz.* In *The Attorney General v. Newcombe* (a) Lord *Eldon* stated the rule of construction to be, that "if usage is to cut down that sense the words will bear, and to impose upon them a restrictive qualification, clear evidence ought to be produced that the instrument admitting a larger sense has been practically acted upon in the more limited sense." It is shown clearly here how the usage has sprung up, and that it had not a legal commencement. The difficulty has often presented itself as to what the meaning of the term is, in charters of this date and earlier; the result of the decisions is, that "inhabitant" means every independent person boiling his own pot, being a pater familias, having his room, or other lodging, to himself, though not a householder. The definition is given in *Bempde v. Johnstone* (b), with reference to domicile, "the place of residence, with a fixed purpose of remaining, and which cannot be referred to an occasional or temporal purpose either of pleasure or of business." In a recent case, *Faulkner v. Elgar* (c), the Court seemed to have thought that where there was a custom for the parishioners of a parish to elect the perpetual curate, it was not competent for the parishioners to limit the right of voting to those parishioners only who had paid church rates. And in *Arnold v. Bishop of Bath* (d) it seemed that an ancient custom for the parishioners, in vestry assembled, to elect a curate, was not supported by evidence of a custom of a right to elect by those parishioners only who have paid church-rates (e). The principle of those

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(a) 14 Ves. jun. 1.

(b) 3 Ves. jun. 301.

(c) 4 B. &amp; C. 449.

(d) 2 M. &amp; P. 559.

(e) But see *Edenborough v. Archbishop of Canterbury*, 2 Russ. 93, where Lord *Eldon* C. held, that the right of voting for the vicar

vested in the parishioners by a charter of *Eliz.*, might be limited by long usage to those parishioners paying church and poor-rates. The usage in this case appears to have originated with a resolution of vestry in 1715.

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cases is, that no usage can overcome a right established by custom, à fortiori therefore when the right is contained in a charter.

First point.

Lord DENMAN C. J.—In this case the Court is required to issue a mandamus, directing the governors to elect a chaplain for the parish of Sandford, on the ground that the election which has taken place is void. But before this can be done, the Court must see clearly that the election was void. One objection made is, that the nomination is required by the charter to be made with the assent of the inhabitants; and that that has not been the case here. The word relied upon is “*unâcum assensu majoris partis inhabitanicum* ;” and it is insisted that that means the inhabitants shall act with the governors in nominating as well as in assenting to the appointment of the chaplain to be chosen. I confess I am not of that opinion, and I see no objection whatever to the mode which has been adopted in the parish. If the inhabitants do not assent to the party nominated by the governors, they must make a fresh nomination, and no election can take place without the assent of the parish. The assent being given, then the three governors do nominate and appoint, together with the assent of the major part of the inhabitants, in the very words of the charter.

Second point.

As to the right of voting claimed by the inhabitants, we have decided this term (a), that the term “inhabitants” in a charter must receive its explanation from circumstances; namely, either from the context with which it is found, or from the usage that has gone along with it. The usage here has been to confine it to inhabitant rate-payers. It is said, indeed, this limitation could not be in accordance with the meaning of the charter, because poor-rates were not imposed on parishioners till many years afterwards, by the 43 *Eliz.*; but I do not know that such is the case or that compulsory relief to the poor was first imposed by that statute, and I rather apprehend it would be found that there were parochial burdens of this kind on inhabitants before that sta-

(a) *Rex v. Mashiter*, ante, 316.

tute (a). It is then said, that there is no evidence of usage, but I think there clearly is. There is Lord *Hardwicke's* express decision on the point, and Lord *Eldon* seems to have concurred in another case in this opinion, and I think it must now be taken that the point which he decided was at issue, and that it was established to his satisfaction by facts brought before him.

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WILLIAMS J. (b)—I do not see any thing in the expression “*unâcum*,” &c. that at all makes it necessary for the nomination by the governors, and the assent by the inhabitants to go on *pari passu*. If any usage were set up that the two bodies should do it together, there might be some foundation for this construction—but the usage is the other way. The words of the charter therefore stand alone, and a nomination by the governors, with the assent given afterwards by the inhabitants, concur in making it an election by the whole *unâcum* together, completely within the words of the charter.

Rule discharged.

(a) See 5 *Eliz.* c. 3; 14 *Eliz.* c. 5; and Burns' History of the Poor Laws, 104.

(b) *Littledale J.* was absent from indisposition; *Coleridge J.* was sitting in the Bail Court.

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BROWN v. THORNTON.

Monday,  
 Jan. 16th.

ASSUMPSIT. The first count was for freight and carriage of goods from Batavia to Antwerp. The second count was on a charter-party. The third count was for the carriage of goods. At the trial before Lord *Denman C.J.*

A charter-party was entered into at Java. By the law of Holland, which is the law in

force there, the parties, upon entering into such a contract, go before a notary public; he makes an entry in his books, which the parties sign, and he makes out copies from time to time, when requested, which he delivers to the parties. These copies are received in evidence in the Courts of Holland; but at Java the notary's book itself must be produced. These copies cannot be received in evidence in the Courts in England (no proof being given when they were made), either on the ground of the notary being a public officer, whose duty it was to make copies, or of his being the agent of the parties by whose acts they had agreed to be bound.

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at Guildhall, at the sittings after Trinity term, 1835, it appeared that the plaintiff, who sued as the manager of the Australian Company of Edinburgh, claimed 1668*l.* 19*s.* 9*d.* from the defendant for freight of the ship *Portland*, the property of the Company, earned on a voyage from Batavia to London and Antwerp, in 1828 and 1829. The plaintiff attempted to prove a charter-party entered into at Java, by the following evidence :—A witness was shewn a written document, purporting to be signed, sealed and attested. He said the document was signed by a notary public at Java, with whom he was acquainted, and that the signature of the notary was attested by the first member of the Colonial Government at Java. That when a contract of this description is entered into between parties at Java, the notary enters the contract in a book. It is then signed by the parties, and the notary gives to each a copy, either immediately when the contract is entered into, or at any future period, when required by either party. That in Holland the copies delivered out by the notary were received in evidence by the Courts there ; but in Batavia the original, in the notary's book, was produced, and the signature of the notary proved. It was objected, that a copy of the charter-party could not be received in evidence unless it was proved in the usual manner to be an examined copy. The Lord Chief Justice admitted a copy of the charter-party in evidence, and a verdict having passed for the plaintiff, he gave the defendant leave to move to set that verdict aside and enter a nonsuit.

*Cresswell*, in Michaelmas term, 1835, obtained a rule nisi accordingly ; against which cause was now shewn by

Sir *J. Campbell* A. G. and *W. H. Watson* (a). The evi-

(a) It was contended, that independently of the copy of the charter-party, the plaintiff was entitled to recover nominal damages, as there had been some proceedings in Chancery between the same parties, and the defendant had, in

his answers, in that suit admitted that the plaintiff had brought a cargo for him. The Court was, however, clearly of opinion that these admissions had reference to the charter-party.

dence was admissible. The copies of the contract which is entered into before the notary are given out under his notarial seal, and are binding on the parties, because by going before him they authorize him to make the copies. It is not contended that the copy given in evidence was admissible by reason of any rule of evidence in the Courts in Holland, but because the copies are delivered out by the authority of the contracting parties. By the law of the country where the contract was entered into, the copies given out have the force of originals, and their force is not impaired by the entry in the notary's book. Suppose a power of attorney had been executed by the contracting parties, and they had empowered the notary to make copies, and had agreed that they would be bound by the copies he made, in that case there can be no doubt the copies made by him would be admissible in evidence. *Appleton v. Lord Braybrook* (a) and *Black v. Lord Braybrook* (b), cited at the trial, are inapplicable. They were actions on judgments obtained in the Supreme Court of Jamaica, and the question in each case was, whether the judgment had been properly authenticated. In the former case it was proposed to authenticate the judgment in the following manner: first, to shew by a certificate of the governor, under the great seal of the island, that *Clayton* was a notary public; secondly, to prove, by a certificate of *Clayton*, the notary public, that *Smith* was clerk of the Supreme Court; and thirdly, by producing an instrument which purported to be a copy of a judgment under the hand of the chief clerk. This was held to be inadmissible evidence to prove the judgments. Those cases would have been applicable if it had been insisted that the copy of the charter-party was evidence, because it was admissible in evidence by the law of Batavia. The copies here resemble brokers' notes, which are admissible between the contracting parties, as shewing the contract.

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*Cresswell*, contra. It is said the copies resemble brokers'

(a) 6 M. & S. 34; 2 Stark. Rep. 6. (b) 6 M. & S. 39; 2 Stark. Rep. 7.



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notes; but in this case the contract in the notary's book is signed by the parties themselves. Here the copies are called duplicate originals. According to the law of Batavia, the original, which is the contract entered in the notary's books and signed by the parties, must be produced. Assuming, however, that the copies delivered out by the notary are admissible in evidence abroad, they are not admissible in the Courts of this country. By the comity of nations, the Courts will give effect to a foreign judgment; but the rules of evidence of a foreign country are not to be adopted. There was no proof here when the copies were delivered; and as there was sufficient time to send to Batavia after the action was commenced, it is to be inferred that they were delivered out long after the contract had been entered into. Assuming that the parties did agree that the notary should be their agent, and deliver out copies, and that the copies should be binding, the utmost the parties can be supposed to agree to is, that the copy made by the notary at Batavia should be binding there, not that they consent to waive any objections which might arise on their production in an English Court of Justice. A chirograph of a fine is evidence between the parties to the fine in the Courts here; *Lewis v. Lark* (a); but that is on the ground that the chirographer is an officer appointed by the Courts here to deliver out copies, which form part of the title of the parties, and that his duty is not completed until that has been done. So, for the same reason, copies of court rolls, and the indorsement of the inrolment of a deed, are evidence; *Rex v. Hopper* (b). But the notary is not an officer appointed by any Court to make out copies. These copies are not the binding contract, but evidence of it. [Coleridge J. Was not the officer the authorized agent of the parties to make copies?] The only proof that the notary is such an agent is the course of law in Batavia. There is no proof of any express agreement to be bound by that law in this country.

(a) Plowd. 410.

(b) 3 Price, 495.

Lord DENMAN C. J.—I apprehend these to be the facts of the case:—The original contract is in the notary's book at Batavia ; the parties there sign that book, and then the notary gives out copies to the parties. At Java, where the original book is kept, it must be produced ; but at Rotterdam and Antwerp, the witnesses say, the copies would be received in evidence, and full faith be given to them. That is very different from saying that the copies are considered as the binding documents. It occurred to me at the trial, and I certainly should have been extremely glad to find I could maintain that doctrine now, that possibly the notary might be considered as an officer selected by the parties for the purpose of giving out copies, and that therefore they would be bound by them. The copies produced at the trial were not even identified as the same which were made and given out when the contract was entered in the notary's book. Besides, it appears these documents may be given out at any time, and that the same faith is given to them in the Dutch Courts at whatever time they are taken out. There is no proof in the present case that these copies were not taken out within six months of the trial itself. It is clear to my mind that it is the force of the Dutch law only which gives them the value which they have in the Dutch Courts. It is because the officer is recognized by them as the proper officer by law to make copies, that they receive them in evidence. *Appleton v. Lord Braybrook* (a) and *Black v. Lord Braybrook* (b) shew clearly that this Court will not adopt the rules of evidence of foreign Courts. It is not therefore the consent of the parties which gives effect to these copies ; and it has been properly argued, that the parties cannot be considered as giving any consent to waive objections that might arise on the production, in proof, of these documents in any English Court of Justice in which they might happen to be litigated. I think, therefore, we have not sufficient proof of the document here.

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(a) 1 Stark. Rep. 6 ; 6 M. &amp; S. 34.

(b) 1 Stark. Rep. 7 ; 6 M. &amp; S. 39.

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WILLIAMS J. (a).—I am compelled, not very willingly, to entertain the same opinion. I own I was a good deal struck at one time with the argument that the notary on this occasion must be considered as the agent of both parties for the purpose of making and giving out copies. However, it seems to me on further consideration, that it is impossible so to consider him, because the parties go before the notary, in conformity with the law of the place where the contract is entered into. But they enter into no special agreement, or any thing that amounts to an agreement, that the copies should be receivable in evidence in any other place. On this evidence it is impossible not to see that the entry in the notary's book is the real and original document; and if it be, then comes the question whether the copy received in evidence was properly authenticated; and it clearly was not, according to the rules of evidence in this country.

COLERIDGE J.—It appears to me the plaintiff cannot maintain this action at law without giving some legitimate evidence of the charter-party. That therefore makes the question before the Court merely a question of evidence; which must be decided according to the laws of this country, although it may relate to a transaction in a foreign country. It is only necessary to see, then, whether the general rule with regard to the production of a document by the law of this country has been complied with. In the first place, it was contended, that this document given in evidence was not a copy, but the original binding contract. I think, upon looking at the facts as they appear, that certainly is not the case. It seems the parties go before a notary public, who makes an entry in his book, which they sign, and that he either then, or at some future time, either in the presence or not in the presence of the parties, makes and gives out copies, to one or the

(a) *Littledale J.* was absent from indisposition.

other, of the entries in his book. The document given in evidence in this case is one of those copies; under what circumstances made, whether or not in the presence of the parties, we do not know. I think it is quite clear on this statement, that the original contract between the parties is that which they have signed in the book of the notary public. Then the original is not produced, and it cannot be produced. It is not denied on the other side but that secondary evidence might have been given of this instrument. Has secondary evidence been given of it? Certainly not secondary evidence in the strict and regular sense, viz. by the production of a copy examined with the original. But the copy is sought to be made out as good secondary evidence in one of two ways, either that it is a copy issued by a public officer, assimilating it to the case of a copy issued by the officer of the Court, and produced in the Court of which he is an officer—certainly it cannot be made out to be such a copy on the facts of this case—and secondly (on which I had great difficulty in my own mind), that it is a copy made by a person authorized between the parties to deliver a copy to each, which should guide the others respectively. I do not think, when what took place is examined, that it amounts to more than that the parties went to the notary at Java, took a copy in the ordinary course from him, and that that copy would have been received with the same degree of faith as the original itself at Antwerp or any other place where the Dutch law prevails, but that does not supersede the law of evidence in this country.

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Rule absolute (a).

(a) See *Trimby v. Vignier*, 1 *win v. Furnival*, 1 C. M. & R. 277; N. C. 151; *S. C.* 4 M. & Scott, 4 Tyr. 751; as to the rules laid 695; *Huber v. Steiner*, 2 Scott, down for suing on contracts made 304; & C. 2 N. C. 202; and *Al-* in a foreign country.

1837.

*Monday,*  
*Jan. 16th, and*  
*Monday,*  
*Jan. 23d.*

A testator seized of freehold land, after giving several pecuniary legacies, devised as follows: "I give unto *W. L.* and *A.* his wife, for and during their natural lives, all and every my messuages, lands, and tenements, hereditaments and premises whatsoever, in the city of N. or elsewhere in the kingdom of Great Britain, and from and after the decease of the said *W. L.* and *A.* his wife, my mind and will is, the said messuages, lands, and tenements, hereditaments and premises, shall be equally divided unto and amongst such of the children of the said *W. L.* and *A.* his wife, as shall be then living." The will then disposed of the residue of the personal estate. It was held, that the children took only life estates, as tenants in common, and not estates in fee.

SILVERY v. HOWARD.

**ASSUMPSIT:** The first count of the declaration set out a contract between the plaintiff and the defendant for the sale of some land, and that the defendant had agreed to make out a good and perfect title to it before a certain day, and then averred that the defendant had not made out a good and perfect title. The first plea alleged that the defendant did make out a good and perfect title, and upon that issue was joined. At the trial before Lord *Abinger* C. B. at the Spring assizes 1835, for the city of Norwich, it appeared that whether or not the defendant had made out a good title, depended upon the construction to be put upon the will of *John Lamb Love*. The testator was an illegitimate child, and had died without issue. The will, after giving a pecuniary legacy to *William Lamb* and other persons, proceeded as follows:

"In the name of God, amen: This is the last will and testament of me *John Lamb Love*, of the city of Norwich, butcher, made the 26th day of May, in the year of our Lord 1791: First, I do hereby nominate, constitute, and appoint *William Lamb*, of the said city, butcher, and *Henry Taylor*, of Bawbergh, in the county of Norfolk, farmer, executors of this my will; and I give and bequeath unto *Sarah*, the wife of *Jacob Pillar*, the interest of the sum of 200*l.* for and during her natural life, to commence from the time of my death; and from and after the decease of the said *Sarah Pillar*, I give and bequeath the principal sum of 200*l.* equally between my said executors: I also give and bequeath unto *Charles Lamb* the sum of 80*l.* to be paid in four different payments at six months each, the first in six months after my decease: Also I give and bequeath the sum of 20*l.* each to such of the children of *Saunders Lamb* as shall be living at the time of my death, to be paid

It was held, that the children took only life estates, as tenants in common, and not estates in fee.

them at the discretion of my executors: I also give and bequeath unto my worthy friend *John Starling* the sum of 50*l.* to be paid him in twelve months after my decease: I also give and bequeath unto my worthy friend *Henry Taylor*, one of the executors of this my will, the sum of 200*l.* to be paid him within twelve months after my decease: Also I give and bequeath unto the widow of my friend *John Claxton*, the sum of 20*l.*: Also unto *John Borham*, the son of *George Borham*, the sum of 50*l.*, as my godson: Also I give and bequeath the sum of 20*l.* for the use and benefit of the charity schools of this city: Also the like sum of 20*l.* to the treasurer of the Norwich and Norfolk Hospital, for the use and benefit of the said hospital: Also the like sum of 20*l.* to the treasurer of the Great Hospital, commonly called the Old Man's Hospital, for the use and benefit of the poor people there: I also give unto my friend *Wor* the sum of 10*l.* Which said several last-mentioned legacies or sums of money, my mind and will is, shall be paid by my executors as soon as convenient after my decease. And I do hereby give and devise unto the said *William Lamb* and *Ann* his wife, for and during their natural lives, all and every my messuages, lands, and tenements, hereditaments and premises whatsoever, in the city of Norwich, or elsewhere in the kingdom of Great Britain: And from and after the decease of the said *William Lamb* and *Ann* his wife, my mind and will is, the said messuages, lands, and tenements, hereditaments and premises, shall be equally divided unto and amongst such of the children of the said *William Lamb* and *Ann* his wife, as shall be then living, share and share alike; and as to what shall remain of all and every my personal estate not hereinbefore disposed of, after payment of such just debts as I shall owe at the time of my decease, my funeral expenses, charges of probate of this will, and other charges incident thereto, and to the executorship thereof, my mind and will is, and I do hereby give and bequeath such remainder or overplus unto my said executors *William Lamb* and *Henry Taylor*:

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And lastly, hereby revoking all former wills by me made, I do hereby declare this only to be my last will and testament. In witness whereof I the said *John Lamb Love*, the testator, have to this my last will and testament, contained in two sheets of paper, and affixed together at the top to the first sheet thereof, set my hand, and to the last sheet thereof set my hand and seal, the day and year first above written.

“ *John Lamb Love.*”

The question was, whether by this will an estate in fee or for life was devised to the children of *William Lamb* and *Ann* his wife. The Lord Chief Baron directed a verdict to be entered for the plaintiff, and gave the defendant leave to move to set that verdict aside and enter a verdict for himself. A rule nisi having been obtained accordingly by *Biggs Andrews* in Easter term, 1835,

*Storks* Serjeant, and *Palmer*, now shewed cause against the rule. The children of *William Lamb* only took a life estate under the will. There are no words specifically giving an estate in fee. The word “estate” is not used, and the estate is not charged with the payment of debts. In *Denn v. Mellor* (a), Lord *Kenyon* took occasion to regret that the same strict words had not been required in testamentary dispositions of land as in other conveyances. In that case Lord *Kenyon* said, “Where the word ‘estate’ has occurred, that word *ex vi termini* has been held to pass a fee. The Courts, indeed, have gone as far as they could to give the absolute interest to the first devisee; but there are certain limits which they have put on their construction of wills, and we must take care not to transgress them.” The material words in this will are, “I give my messuages, lands and tenements, hereditaments and premises, to be equally divided amongst the children of *W. L.*” In *Denn v. Mellor* (a) the words were, “all the rest of my lands,

(a) 5 T. R. 561.

tenements, and *hereditaments*, either freehold or copyhold, I give to A.," and it was held, a life estate only passed to A. There are a great number of cases which shew that as no previous estate in fee is given, the words of the will which have been mentioned will not pass a fee. *Roe v. Holmes* (a), *Roe v. Blackett* (b), *Denn v. Gaskin* (c), *Morgun v. Griffith* (d), *Doe v. Allen* (e). There are certainly some old cases, as *Goodright v. Patch* (f), in which it has been held, that a devise of lands without words of limitation, pass a fee; but those cases have been over-ruled. *Doe v. Tucker* (g) is decisive of the question. In that case the words of the will were as follows:—"I give and bequeath to my wife my freehold estate called Pouncetts, during her natural life: I give to my son *Richard*, my heir, after the death of my wife, 10l.: Item, *all the above bequeathed lands*, after the death of my wife, I give and devise to my son *Richard*, to my son *Thomas*, to my son *Robert*, and to every other of my children then in being, share and share alike, equally to be parted between them." It was held under this devise, that the children only took life estates in their respective shares. In *Roe v. Wright* (h), *Chichester v. Oxenden* (i), and *Randall v. Tuchin* (k), the word "estate" occurred in the will.

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*Biggs Andrews* in support of the rule. It was said by Lord *Kenyon*, in *Andrew v. Southouse* (l), that for nearly half a century it had been the wish of the Courts to give effect to the intention of the deviser as far as they could; and it had been observed, that in almost every case where the words of the devise have been so restrained as to give only an estate for life, the decision has been against what

(a) 2 Wils. 80.

(b) Cowp. 235.

(c) Cowp. 657.

(d) Cowp. 234.

(e) 8 T. R. 497.

(f) Loft, 224.

(g) 3 B. &amp; Adol. 473.

(h) 7 East, 259.

(i) 4 Taunt. 176.

(k) 6 Taunt. 410.

(l) 5 T. R. 294.



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might be supposed to have been the private intention of the devisor. The Court are anxious to find words in a will to enable them to put that construction on it which they would do if not sitting judicially. Whenever it has once been decided that certain words give a fee, that decision has invariably been adhered to. The will first appoints executors; there is then a gift of several pecuniary legacies; the testator then disposes of his real property; he gives a life interest, and after that has terminated, he directs a division; he then disposes of the residue of his personal property; from which it is evident that he supposed he had entirely disposed of his real property. This differs from every case cited except *Doe v. Tucker* (a). The observations of *Wilmot J.* in *Baddeley v. Leppingwell* (b), forcibly apply to this case. In the will there, as in the will under consideration, there was first an express devise for life, and then a devise over. *Wilmot J.* says, "In the devise to *S.* he omits the words 'for and during her life;' which words it must have been supposed he would have inserted in case he had intended to give her only an estate for life, because he had just before done so in the preceding devise to *C.* It is plain, that by giving it her generally, without adding any such restrictive words as he had before added to his devise to *C.*, that he meant to give her the absolute property. He meant to devise it *ut bona et catalla*, as a man unacquainted with the law might very naturally do. *Oates v. Brydon* (c) is a case in point. The will in that case, after gifts for life to *A. B.* and *C. D.*, proceeded as follows: 'I give the said houses, &c. unto the said children of my cousins *T. B.* and *S. W.*, or such of them as shall be then living, *share and share alike*; and if it happen that the said *C. D.* be not living at the decease of the said *A. B.*, then my mind and will is, that the said house, &c. be divided amongst the said children of my cousins *T. B.* and *S. W.* as aforesaid.' It was held that the children took an estate

(a) 3 B. &amp; Adol. 473.

(c) 3 Burr. 1895.

(b) 3 Burr. 1541.

in fee. This case was not cited in *Doe v. Tucker* (a), *Gall v. Esdaile* (b), and *Stewart v. Garnett* (c).

*Cur. adv. vult.*

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LORD DENMAN C. J. now delivered the judgment of the Court:—This was a question whether by a devise of land to children, share and share alike, an estate passed for life or in fee. It has been held repeatedly, and particularly in a late case of *Doe v. Tucker* (a), that such words, uncontrolled by clear proof of an opposite intention in other parts of the will, carry an estate for life only. The cases cited against the application of the rule, all admit of a satisfactory distinction from the present. *Baddeley v. Leppingwell* (d) was decided on the creation of a charge. *Gall v. Esdaile* (b), *Stewart v. Garnett* (c), on the peculiar force of the word “estate.” One case, however, was mentioned, *Oates v. Brydon* (e), which was not noticed by the learned counsel who opposed the doctrine in the argument on the present case, nor in that of *Doe v. Tucker* (a). That was a devise of a house and stable for the life of testatrix’s husband, and after his death to her brother for life, afterwards “to the children of my cousins B. and W., share and share alike,” and if the brother should not be living at the time of the husband’s death, “then my mind and will is, that the said house and stable, with the appurtenances, be divided amongst the said children of B. and W. as aforesaid.” Lord Mansfield and the Court were there of opinion that there was enough, on the whole will, to shew intention that the value of the house and stable should be divided among the seven children, and the defendant, a purchaser from them, had the postea delivered to him. This decision would be the more likely to escape notice, both on this and on former occasions, because the

(a) 3 B. & Adol. 473.

(b) 8 Bing. 323.

(c) 3 Sim. 398.

(d) 3 Burr. 1541.

(e) 3 Burr. 1895.

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principal point in it turns on the effect of confessing lease, entry, and ouster, and the question of estate is not mentioned in the margin. Nor does Sir *James Burrow's* statement of the case appear very satisfactory, the editor, in 1812, making no less than three necessary corrections in the course of a single page. Lord *Mansfield* also commences his judgment on this point of construction by observing, that the whole property was worth but 100*l.*, which low value of property of a wasting nature to be divided among seven children, after two lives, led the Court to think that it must have been meant to be sold, and the produce divided. The result was, that upon the whole of that will there was enough to shew that the testatrix intended the value of the house and stable to be divided among the children. It seems unnecessary for us to say more on the present will than that we find no words in it which clearly convince us that the testator intended to pass a fee; the ordinary rule, therefore, must prevail, by which a clause so worded is deemed to carry a life estate only.

Rule discharged.

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Doe d. HICKMAN v. HASLEWOOD.

1. A testator devised as follows:—"I give unto my wife, her heirs and assigns, for ever, all the residue of my goods, chattels and personal estate

whatsoever and wheresoever, and also all my right, title, and interest, of, in, and to all and every sum and sums of money whatever, which now is, are, or shall be due to me upon and in virtue of any bill, bond, or other securities. *I do likewise make my wife full and sole executrix of the freehold house situate in Great Queen Street, in the parish of St. Giles.* By this devise a fee simple in the house passed to the wife.

2. Where a widow continued to reside in a freehold house of which she was seised, for more than twenty years after her husband's death: Held, that her possession was not adverse, except perhaps against the heir, as her possession might be intended to be in respect of dower.

words: "In the name of God, amen. I *George Heaslewood*(a), of &c., do make and ordain this for my last will and testament, in manner and form following: viz. I give and bequeath unto my wife *Ann Heaslewood*, to her heirs and assigns for ever, all the residue of my goods, chattels, and personal estate, what so ever and whersoever(a), and also all my right, title and interest of, in, and to all and every sum and sums of money whatsoever, which now is, are, or shall be due to me upon and in virtue of any will, bond, or other securities; and I do likewise make my wife, the said *A. H.*, full and sole executrix (a) of the freehold house situate in Great Queen Street, No. 15, in the parish of St. Giles in the Fields, bein (a) the north side of the street in the county of *Midsex* (a). This my last will and testament, hereby revoking all former wills by me made. In witness whereof I, the said *G. H.*, the testator (a), have set and put my hand and seal this day, fourth of June, 1805." The testator died in December, 1805, leaving *A. H.*, his widow, him *surviving*. The testator and his wife lived in the house until and at the time of his death, and the widow afterwards continued in possession until her death, which took place in November, 1833. *A. H.* afterwards married *T. V.*, who died in December, 1817, and in July, 1826, she was married to *J. A.*, and she with her husband continued in possession of the said house until her death as aforesaid. The lessor of the plaintiff is her nephew and heir at law. The questions for the opinion of the Court are, 1. Whether *Ann Haslewood* took an estate in fee simple under the will of her husband. 2. Whether, under the facts of the case, the plaintiff is entitled to recover. The verdict to be entered accordingly. The case was argued in Michaelmas Term last (b).

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Sir *W. W. Follett* for the lessor of the plaintiff. Although technical words have been improperly used in this will, which was evidently drawn up by an illiterate person, the

(a) Sic in orig.

*Denman C. J. Patteson, Williams,*

(b) November 18th, cor. Lord and Coleridge Js.

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First point:  
Words in a  
will to be bent  
to give effect  
to testator's  
intention.

intention of the testator is clear, that his wife should take a fee in his freehold house. With respect to his personal property, he leaves it to his wife, her *heirs* and assigns; but under such a bequest the executors would take and not the heirs; *Holloway v. Holloway (a)*. So it has been held that *real* property may pass under the description of personal property; *Doe v. Tofield (b)*; and it is submitted, that the rule of construction is, if the real intention of the testator can be discovered without doing violence to the words, effect is to be given to it. It has been suggested there is a miscopying in the will, and that the paragraph describing the house in Queen Street should follow the words "*other securities and*" in the preceding sentence, and the words "I do likewise make my wife executrix of" should be read immediately before "*this my last will,*" occurring in the latter part of the sentence, which would certainly remove all doubt. But it is not necessary for the lessor of the plaintiff that this transposition should be made. The intention of the testator, in making his wife executrix of his freehold house, was not to make her executrix of all his freehold property, he wished to give her some interest in that particular freehold; and he meant to give her the same authority over it she would have over personal property. She must therefore take either an estate in fee, or nothing, for there are no words to confine it to a life estate. It has been frequently said from the bench, that the rule of construction cutting down general devises to a life estate, has nearly always defeated the intention of the testator (*c*). When the intention therefore is plain, the Court will endeavour to find words in the will which can carry out the testator's intention. It is impossible not to see, that the testator's intention here was to give his widow the house in Queen Street, and there are authorities to shew that she is capable of taking it under the term 'executrix.' Thus, in *Loveacres v. Blight (d)*, where the

(a) 5 Ves. jun. 403.

(b) 11 East, 246.

(c) Per Lord Kenyon, *Goodright v. Barron*, 11 East, 222; per Lord*Mansfield, Loveacres v. Blight*,  
Cowp. 355.

(d) Cowp. 352.

testator gave to his sons, whom he made his sole executors, all his lands; it was held that they took a fee; and those words are not so strong as the words "full and sole executrix," in the present case. So in *Rose v. Hill* (a), the term 'executors' in a will was held to be equivalent to heirs, the intention of the testator being apparent; and in *Roe v. Patteson* (b), where the testator, after bequeathing certain sums in the stocks, devised all the remainder in the above stocks, with his freehold property, to M. S.; it was held that M. S. took a fee in the freehold, and Lord Ellenborough said "there are no words of such an inflexible nature as will not bend to the intention of a testator when it can be collected from the context of his will. Accordingly we have lately decided that the real estate passed under a devise of the personal property" (c). [Coleridge J. Your argument assumes then that she took an estate for life in the freehold?] That would be conceded. Again, in *Doe v. Gillard* (d), where the testator made several bequests, and then said, "I constitute R. G. my sole executor for ever," it was held that the executor took a fee simple in the lands. The only difference between that case and the present is, that the words 'for ever' are added. [Coleridge J. There was a case before the Court yesterday, in which it was contended, that under a devise of this kind, the executrix took nothing; and *Piggot v. Penrice* (e), *Shaw v. Bull* (f) were cited.] *Shaw v. Bull* is reported in a book of no authority, and would probably receive a different decision at the present day. In *Piggot v. Penrice* and *Clements v. Cassye* (g), and a case cited in *Com. Dig.* (h) the decisions are against the executor taking the land, but that was on the principle that the heir is not to be disinherited unless the intention is clear. Here the intention is clearly expressed with reference to a

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(a) 5 Burr. 1881.

(b) 16 East, 221.

(c) *Doe v. Tofteld*, 11 East, 246.

(d) 5 B. &amp; Ald. 785.

(e) *Préc. Chan.* 471; 1 Eq. Cas.

Abr. case 13.

(f) 12 Mod. 593.

(g) Noy, 48.

(h) *Com. Dig. Devise* (N 3.)

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particular freehold house. These words are not to be rejected, and therefore the Court must hold that they convey an estate in fee, as no smaller estate is indicated. [*Patteson J.* The words "I make *A.* my sole heir," were held in *Taylor v. Web* to pass the fee (*a*). If I make *A.* my sole executor, that should pass the fee also ] Supposing the house were leasehold only, it would clearly give her the entire disposition of it. [*Patteson J.* But if the word 'executrix' is to be read 'heir,' this effect follows, there would be no executrix to the will.] She might be administratrix with the will annexed. But if the Court should hold that Mrs. *Haslewood* took no interest at all under the will, as she has been in possession for twenty years, that would be sufficient to give her right to the property by adverse possession. *Doe v. Cooke* (*b*).

Second point:  
Title acquired  
by twenty  
years' adverse  
possession.

First point:  
To make *A.*  
executor of  
Blackacre,  
does not pass  
a fee.

*Butt* for the defendant. There are distinct authorities to shew that a devise of this sort to the executrix does not pass the fee. The utmost that can be said is, that the testator gave his widow a life estate in the freehold house. *Loveacres v. Blight* (*c*) is contradicted by later cases; for in *Denn v. Gaskin* (*d*), in the same book, where the testator gave his freehold messuage in *G.* to *M., G.* and *T.* equally; the Court held that they took an estate for life only, although he began his will with the words "as to all such worldly estate," which is a strong proof that he meant to devise the whole of his property; and those words are not to be found in the present case. But *Goodright v. Barron* (*e*) is an express authority against the lessor of the plaintiff, for there the will was, "I give and bequeath to my wife, whom I make my sole executrix, all and singular my lands, &c. by her truly to be possessed and enjoyed." Nevertheless it was held that the wife took only an estate for life; and Lord *Ellenborough C. J.* said "for want of words of limitation, or some words from whence

(a) *Styles*, 301.(b) 7 *Bing.* 346.(c) *Cowp.* 352.(d) *Cowp.* 657.(e) 11 *East*, 290.

the intention to pass the fee must be necessarily implied, the widow only took an estate for her life." *Clements v. Cassye* (a) is also very like the present case; the words of the will there were, after a devise of Blackacre and Whiteacre, to testator's wife for life, the remainder in Blackacre to B. in fee: "Item, I make my wife executrix of all my goods and lands;" and it was held that those words did not give the fee of Whiteacre to the wife. This case was cited in *Shaw v. Bull* (b), where a similar decision was given; and *Piggot v. Penrice* (c) is even a stronger authority against the lessor of the plaintiff. There the testatrix made her niece executrix of all her goods, lands, and chattels, and it was held that the heir was not to be disinherited except by express words or necessary implication, and that in that case there was neither. All the last cases now cited turned upon devises much more strongly worded than the present, for the wills expressed either an intention to devise all the worldly estate or the surplus of the estate, of the testator, which has been held to shew the testator meant to devise his whole estate (d). *Denn v. Mellor* (e) is also an authority to the same effect; and although the judgment in that case was afterwards reversed, in the Exchequer Chamber, the decision of the King's Bench was ultimately confirmed in the House of Lords. In a late case also in the Exchequer, *Doe v. Baines* (f), where the testator made his daughter his executrix, and gave her all his lands, &c. by her freely to be possessed and enjoyed, it was held that she only took a life estate. The only cases in which a devise to an executrix has been held to give more than a life interest, are those in which there has been a charge upon the estate devised in the hands of the executor, in which cases, unless the executor takes an estate in fee, he may not be able to

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(a) Noy, 48.

(b) 12 Mod. 593.

(c) Prec. Chan. 471.

(d) See *Hogan v. Jackson*,  
 Cowp. 307, confirmed on appeal

in the House of Lords, 3 Bro.  
 Parl. Ca. 388.

(e) 5 T. R. 558; S. C. 1 B. & P.

558; 2 B. & P. 247.

(f) 2 C. M. & R. 23.



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Second point.

execute the will of the testator. This principle is the basis of the decisions in *Doe v. Gillurd* (a), *Rose v. Hill* (b), *Doe v. Holmes* (c), *Goodtitle v. Maddern* (d), *Doe v. Woodhouse* (e). There is nothing on the face of this case to raise the second point. The sole question is, what estate did the widow take under the will? the second question is only a repetition of the first question in general terms.

Second point. Sir *W. W. Follett* in reply. It is submitted, that if the widow took no interest under the will, the lessor of the plaintiff is certainly entitled to recover on an adverse possession of twenty years, as the case finds that the widow was in possession from 1805 to 1833. *Doe v. Cooke* (f), and an old case in *Saunders* (g). [*Patteson* J. On the supposition that this devise passed nothing to the widow, she would be entitled to dower, under which she might have been put into possession.] She would have no right to possession until her dower was set out by metes and bounds, but nothing of the kind appears in this case. [*Patteson* J. Why may it not be intended that that was done? The person against whom her possession would have been adverse, was the heir at law of the husband, but it does not appear who he is.] No authority has been cited to shew that when a specific estate has been devised to a particular person, the Court has ever held that no estate passes. The general law on the subject is laid down in *Cruise's Dig.* (h), "a devise to a person to give and sell passes an estate in fee," citing *Co. Lit.* 9 b. And he goes on, "Thus, where a person devised to A. to give, sell, and do therewith at his will and pleasure, held that the devisee took an estate in fee" (i). An executrix is a person who has

First point.

(a) 5 B. &amp; A. 785.

(b) 3 Burr. 1881.

(c) 8 T. R. 1.

(d) 4 East, 496.

(e) 4 T. R. 89.

(f) 7 Bing. 346.

(g) Probably notes to *Yard v. Ford*, 2 Wms. Saund. 174.

(h) 6 Cruise Dig. Devise, c. 11, page 225, pl. 6.

(i) Moor, 57.

power to sell and dispose of the property of the testator, and the testator thought he was giving his wife the house in question when he gave her those powers. The cases cited on the other side, shew what weight has been given to the word 'executor.' In *Loveacres v. Blight* (a), in which it was held that the devise conveyed the fee, the devise was to the executors; but in *Denn v. Gaskin* (b), where the fee was held not to pass, there are no expressions in the will relating to executors. And although in *Loveacres v. Blight*, the devise was of lands to the executors "by them truly to be possessed;" in *Goodright v. Barron* (c), it was held that those words were not sufficient to pass the fee. The question therefore is untouched, whether constituting a person executor of lands, does not give him an estate in fee. In *Trent v. Hanning* (d), it was held that the expression 'trustees of inheritance,' gave the trustees a fee in the testator's lands; and in *Doe v. Gilbert* (e), under a devise of the testator's testamentary effects to T. G., whom he made his sole executor, it was held that T. G. took a fee in the testator's lands; for it was said, that the expression 'testamentary effects,' showed the testator's intention to give his executor his whole estate. The case cited by *Patteson J.*, *Taylor v. Web* (f), was confirmed by *Marret v. Sly* (g). *Shaw v. Bull* (h) does not apply, for it turns upon the words "all the overplus of my estate," which he gave to his wife as executrix, and he had previously given an estate to her and her heirs, shewing the testator knew how to distinguish between the two estates. In *Piggot v. Penrice* (i) and *Clements v. Cassye* (k), the wills did not shew any intention on the part of the testator to give any specific estate of freehold. There are several cases which demonstrate that where the intention of the testator can be

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(a) Cowp. 352.

(b) Cowp. 657.

(c) 11 East, 220.

(d) 7 East, 97.

(e) 3 B. &amp; B. 85.

(f) Styles, 301.

(g) 2 Sid. 75.

(h) 12 Mod. 593.

(i) Prec. Chan. 471.

(k) Noy, 48.

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collected, the Court will put a different construction on words to their usual legal meaning: thus "heirs male of the body," have been construed to be words of purchase (a), and "son" to be a word of limitation (b).

*Butt* in reply to the new cases. *Doe v. Gilbert* (c) is an authority for the defendant, for *Dallas* C. J. said, "Here under the clause containing the devise of real property, if that clause be taken alone, an estate for life only passes;" but on being coupled with the introductory clause, and the will expressing an intention to dispose of the whole property, and the general words in the residuary clause, it was held, that the fee did pass. In this case there is no such intention expressed at the commencement of the will, and no residuary clause.

*Cur. adv. vult.*

Lord DENMAN C. J., on this day, delivered the judgment of the Court. After reciting the will, and stating the facts of the case, his lordship proceeded as follows:

Upon the argument of this case many cases were cited, not, we think, (with one exception,) bearing directly upon this, but rather in illustration of the general principle upon which our decision ought to be founded. We have referred to those cases and perused them, and are clearly of opinion that none can be considered to be directly decisive of this point. We could not fail to observe, however, upon that perusal, a constant reference to the principles upon which this and every other will is to be construed, viz. (c) "that every case of this sort depends upon its own peculiar circumstances, for in every case the question is one of construction, to be made on the whole of the will; every case therefore is individual." The question for our decision seems to depend upon two points: first, whether the inten-

(a) *Goodtitle v. Herring*, 1 1626.

East, 264.

(c) Per *Dallas* C. J., in *Doe v.*

(b) *Chapman v. Brown*, 3 Burr. *Gilbert*, 3 B. & B. 88.

tion of the testator can be clearly and satisfactorily collected from the will; second, whether we are enabled, consistently with the rules of law, to carry that intention into effect. Upon the first point it is to be observed, that it does not appear that the testator was possessed of any other property beyond that which is noticed by his will. Nor can we perceive an allusion to any other object of his bounty, except his wife. Moreover, in the earlier clause of the will, all the testator's personal property, including every thing due to him upon securities of every kind, is, (though the word "heirs" is there as much misapplied as the word "executrix" to the freehold house,) beyond all doubt, bequeathed to the wife. Having thus completed his purpose, with respect to the whole of his personalty, the will immediately proceeds to notice the only remaining property of the testator—his freehold house, No. 15, Queen Street, in the parish of St. Giles. For what purpose then can we suppose that the house was introduced into the will at all? Why is it mentioned in immediate connection with property most certainly disposed of, if he meant to die intestate with respect to it? We can discover no other probable or reasonable supposition, but that the house was introduced into the will with the intention of disposing of it; and if so, there is no other conclusion possible, but that he meant the disposition to be in favour of his wife. We therefore think that by the words "I do likewise make my said wife full and sole executrix of the freehold house, &c." the testator did intend to devise that house to his wife; and that, (however inartificially he has executed his purpose,) he fully believed that he had done so. Whatever effect can reasonably be given to the word "likewise," we are not, we think, authorized to reject and expunge as wholly insignificant and unmeaning,—a clause in the will in which we have no doubt that the testator himself thought his meaning had been most fully and even learnedly expressed. And if this clause must be retained, as we are of opinion it must, it seems impossible to say that the testator did not intend to

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give to his wife *some* interest, and if so, there is not only nothing to limit the intention to giving her any thing less than "the full and sole" dominion over the house in question, or, in other words, an estate in fee simple therein; but the terms "full and sole executrix," as it would import the grant of the entire interest and dominion in and over property whereto it is correctly applicable, evinces an intention to grant no less in that to which it is through ignorance misapplied. Thus much, therefore, as to the *intention* of the testator. The solution of the first point has, we think, a very considerable effect in disposing of the second; indeed the last argument, if correct, concludes the question; because we are aware of no authority, and none such has been suggested, which affects to impose a limit beyond which the Courts shall not proceed in their favourable construction of wills, to carry into effect the intention of a testator. Words which are supposed to have (and which really have, when correctly and technically applied,) a precise and definite meaning, are bent and diverted continually from that meaning, if the sense of the will requires it. "Heirs," "issue," "son," &c. are familiar instances of the kind now alluded to. The word "legacy" must be admitted to have a direct reference to a bequest of personalty, and not to a devise of land; yet in *Hardacre v. Nash* (a), in which, by the former part of the will, there had been 150*l.* each given to a son and daughter of testator, afterwards certain land to each, and afterwards it was provided that upon their death, "those legacies that had been left them should return to his wife;" Lord *Kenyon* thus states and deals with the argument arising from the proper meaning of the word: "Considerable stress was laid on the word 'legacies,' and it was argued that that word was an appropriate term applicable to personal estate only, but the same technical and correct expressions are not to be expected from unlettered persons as are usually found in wills drawn by professional men; even if there were no decision warranting us in say-

(a) 5 T. R. 716.

ing that the word "legacy" may be applied to real estate, if the context required it, I should have had no difficulty in making such a determination for the first time." His lordship then adds, that such a construction had been put upon it (as it had most undoubtedly) in *Hops v. Taylor* (a), upon the short ground "that it was most agreeable to the intention of the testator, in that case, to construe the word 'legacy' to extend to land." *Doe v. Tofield* (b), however, carries the principle as far perhaps as can be necessary for the decision of this or indeed any other case. The only question was, (as stated in the judgment delivered by the Court,) whether freehold lands passed under the words "all my personal estate," and the Court had no hesitation in saying that the lands did pass by that description. One only case (the excepted one before alluded to) we understood to be adduced as in point, for the purpose of shewing that whatever may be the probable conjectures, the Court cannot, or at least ought not, to infer that a fee passed to the wife in this case, because the same inference has been before repudiated under similar circumstances. This case is *Piggot v. Penrice* (c). We however are so far from thinking that it is in point, that the manifest distinction between the cases, and even the reasoning of the Lord Chancellor, seem clearly to lead to a conclusion in favour of the lessor of the plaintiff. The question in that case arose entirely upon the following words:—"I make my niece executrix of all my goods, lands, and chattels," and it was whether under those words any lands could pass. Now before we refer to the reasons of the Lord Chancellor, it is impossible not to perceive the extreme dissimilarity between that case and the present. There, the word "lands" is placed in the midst of words strictly and legally referable to the character of executrix; in the present case, no personalty is alluded to in the clause in question, but the wife, after a bequest of the personalty, is made "sole and full executrix" of a free-

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*Doe*  
v.  
*HASLEWOOD.*

(a) 1 Burr. 268.

(c) Prec. Chan. 471.

(b) 11 East, 246.

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hold house only. The Lord Chancellor, in reasoning upon the case, for the purpose of shewing that the heir could not upon such uncertainty be disinherited, does not rest upon the effect of the word "lands," being neutralized by its juxta-position with personalty, but proceeds to observe "that the word 'lands' was not to be rejected as useless, for probably there might be rents in arrear of those lands, and by making her executrix of her (testatrix's) lands, those rents would pass." Now in this view of the case there was no inference whatever to be drawn in favour of an intention that land should pass, of course therefore it furnishes no argument against giving that effect to words which make that intention clear.

The word "executrix" happens to have received a different construction in two other cases. In *Clements v. Cassey* (a), the devise was of Blackacre and Whiteacre to the wife for life, remainder in Blackacre to J. S. in fee, the remainder in Whiteacre not being given over: "And I make my wife executrix of my goods and land." But here the limited devise of land, followed by the combination of land with goods, were justly thought to negative the intention of devising the remainder in Whiteacre to the wife. In *Shaw v. Bull* (b), testator seised of five houses, devised four specifically to several persons, one of these four to his wife in fee charged with legacies; finally, "all the overplus of my estate to be at my wife's disposal, and make her my executrix." The Court was divided in opinion, *Nevill J.* thinking that a fee passed to the wife in the fifth house also, the Chief Justice *Trevor*, *Powell J.* and *Blencowe J.* differed from him, not because the words were incapable of passing the fee, if the intent were clear, but because they thought the intent negated by the other provisions. The last case which we shall notice is that of *Thomas v. Phelps* (c), and we do so partly because the testator had made nearly the

(a) *Noy*, 48.(c) 4 *Rus.* 348.(b) 12 *Mod.* 593.

same indiscriminate abuse of terms as in the present instance, and because the Master of the Rolls treats very lightly such abuse and confusion. In that case the testator had given a certain house to his son, *James Phelps*, and then added, "him and my daughter *E. P.* I make my joint executor and executrix of this my will, of all that I possess in any way belonging to me, freely to be possessed and enjoyed, only my household furniture, which I give to my daughter who lives longest single," &c. Upon this will the argument was, that the gift being to an executrix, she could only take personal property; and further, that if the clause could pass a freehold, there were no words of limitation to carry it beyond a life estate. The Master of the Rolls observed, "that it was the will of a person who had not the advantage of professional assistance, and was plainly ignorant of the nature and character of the office of executor, and of the distinction between real and personal estates, as it regards that office." He then adverted to the words above set forth, and said, that they were equivalent to the gift of all the testator's property, and would pass *all* the testator's interest in that estate. Upon the whole, we are of opinion that the intention of the testator clearly was to give to his wife, *Ann Haslewood*, the freehold of the house in question; and further, that the words in the will are sufficient to carry that intention into effect, and that no rule of law will be contravened by our giving judgment for the plaintiff.

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Postea to plaintiff (a).

(a) See the following case.





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## DOE d. PRATT v. PRATT.

A testator devised that his debts and funeral expenses should be paid by his executor. He then bequeathed two annuities, and gave five shillings to his heir at law; and then followed these words:—"I appoint W. P. my whole and sole executor of all my houses and land situate at F." It was held that an estate in fee passed by this devise to W. P.

**EJECTMENT** for land in the parish of Folckton, in the East Riding of Yorkshire. At the trial before *Parke B.*, at the Spring York Assizes, 1835, it appeared that the lessor of the plaintiff claimed as the heir at law, and the defendant as the devisee of *Thomas Pratt*. The question upon which the case turned was, whether, by the will of *Thomas Pratt*, any estate was devised to *William Pratt*, the defendant. The will of *Thomas Pratt* was as follows:—

"In the name of God, amen. I, *Thomas Pratt*, of &c., do make this my last will and testament in manner and form following: first, I will that all my debts and funeral expenses be paid and discharged by my executor hereinafter named. I then give and devise to my sister, *Alice Hall*, widow to *William Hall*, Flambro', the sum of 2*l.* 10*s.* annually for each year, during the term of her natural life. Also to my niece, *Ann Pratt*, the sum of 2*l.* 10*s.* annually, during the term of her natural life. Also I give unto my nephew *John Pratt*, the sum of 5*s.*, to be paid at the end of twelve months after my decease. I appoint my nephew *William Pratt*, my whole and sole executor of all my houses and land situate at Flinton, in the county of York. This being my last will and testament, I have herein set my hand and seal, this sixth day of August, in the year of our Lord one thousand eight hundred and thirty. *Thomas Pratt*. Witnesses, this sixth day of August, 1830. *B. G., C. R., W. N.*"

Upon the authority of *Piggot v. Penrice (a)*, the learned judge directed a verdict to be entered for the plaintiff, but gave the defendant leave to move to set that verdict aside, and enter a verdict for himself. In Easter Term, 1835, *Starkie* obtained a rule *nisi* accordingly, against which,

*Alexander and Wightman* shewed cause (*b*). The ques-

(*a*) Prec. Chan. 471; S. C. 1 Eq. Ca. Abr. page 209, case 13; Gilb. Eq. Rep. 137.

(*b*) Nov. 17th, cor. Lord Denman C. J., *Patteson, Williams, and Coleridge Js.*

tion is, whether the words in the will which appoint *William Pratt* my whole and sole executor of all my houses and land, are sufficient to disinherit the heir at law. The Courts have always construed wills with strictness, where the will disinherits the heir. *Piggott v. Pearce* (a) is an express authority for the plaintiff. The words of the will were: "I make my niece executrix of all my goods, lands, and chattels." The testator had real and personal estates but no leasehold property, and the lord chancellor was clearly of opinion that the real estate did not pass to the niece by the will. *Clements v. Cassye* (b), is also an authority in point. [Lord Denman C. J. There *expressio unius fuit exclusio alterius*. Coleridge J. How do you distinguish *Doe v. Gillard* (c)?] There the estate was charged with the payment of debts. In *Shaw v. Bull* (d), a testator seised of two houses, after a specific devise of one house, gave all the overplus of his estate to be at A.'s disposal, and made her executrix. It was held by three justices that the second house did not pass to the wife by the will. [Coleridge J. What meaning do you affix to the term "executrix of all my house and land?"] There might be rent which she was to receive. [Patteson J. You give no effect to the word "land."] By that word such lands, viz. leaseholds, as an executor may take, pass. It is so held in a case in *Rolle's Abridgment* (e). Upon a minute examination of the clauses of the will it will be found that it is not necessary that the executor should have the fee to effectuate a single object the testator had in view. First, the debts and funeral expenses are to be paid. That is immaterial, because the real estate is not charged with the payment of them. If either the debts or the funeral expenses had to be paid by the executrix out of the real estate, then the fee undoubtedly would have passed. In *Doe v. Baines* (f), a life

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(a) 1 Eq. Ca. Abr. 209, case 13; S. C. Prec. in Chan. 471; Gilb. Eq. Rep. 137.

(b) Noy, 48.

(c) 5 B. & Ald. 785.

(d) 12 Mod. 593.

(e) Roll. Abr. 613; S. C. 1 Eq. Ca. Abr. 209.

(f) 2 Cr. M. & R. 23.

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estate only passed by a bequest to the testator's daughter, whom he made his executrix of all and singular his land, freely to be possessed, because the debts were not charged on the real estate, and therefore it was not necessary the executrix should have the fee. The next clause in the will is a gift to *Ann Hall* of an annuity of 10*l.*, and then follows the devise of an annuity to *Ann Pratt*. These annuities are not charged on the real estate, and therefore they would be payable out of the personal. An annuity is a personal legacy, *Hume v. Edwards* (a), and in case a portion of the personal estate set apart to pay the annuitant should prove insufficient, the deficiency will be made good out of the residue; *Davies v. Wattier* (b). It is not, therefore, necessary that any one should take the land in order to meet that charge. Then there is a gift to the heir at law of 5*s.* It is established beyond controversy by *Denn v. Gaskin* (c), that a gift to the heir at law will have no effect in forwarding a construction which is to disinherit him. *Doe v. Gillard* (d) will probably be cited for the defendant. There, in order to effectuate the intention of the testator, it was necessary for him to take the fee, as the real estate was charged with the payment of debts. Here the real estate is not charged with the payment of debts. *Anthony v. Rees* (e) may also be cited; but in that case there was a devise of an annuity to be paid out of the freehold estates, and it was necessary that the trustees should have the fee-simple to meet that charge. In *Loveacres v. Blight* (f), the testator commenced his will thus: "as touching my worldly estate," shewing an intention to dispose of all his real estate; and there was also a charge on the real estate. Wherever the executor has been held to take the fee, it has been for this reason, that unless the executor had the fee, the intention of the testator could not be carried into effect. Here it is not necessary that the executor should have the fee, either

(a) 3 Atk. 693.

(b) 1 Sim. &amp; Stu. 463.


(c) Cowp. 657.

(d) 5 B. &amp; Ald. 785.

(e) 2 C. &amp; J. 75.

(f) Cowp. 352.

to pay the funeral expenses or the debts, or the annuities. It is admitted, that if the executor takes any estate by the will, it is an estate in fee.

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*Cresswell* and *Starkie* contra. The argument that by the word 'land' leaseholds passed, falls to the ground, as the testator was not possessed of any leasehold property. The sole question is, what is the meaning and intention of the testator; for whatever that meaning is, the Court will carry it into effect, whether it does or does not disinherit the heir at law. The cases cited for the plaintiff are all distinguishable from the present case. In *Clements v. Cassye* (a), no particular lands are mentioned, of which the wife was to be executrix. If the devise in that case had been of all the land called Whiteacre, that might have been authority in favour of the plaintiff's construction of the will. *Shaw v. Bull* (b) is a case of very questionable authority. The word 'estate' is now held to pass the fee. In *Piggot v. Penrice* (c), the Court were seeking to ascertain the meaning of the word 'land' in the will, and it was held to mean leasehold land, because the word 'land' was interposed between goods and chattels. In *Thomas v. Phelps* (d), there was a devise by a testator to A. and B. in these words: "Whom I appoint my executors of all that I possess in any way belonging to me, by them freely to be possessed or enjoyed, of whatever nature or manner it may be." This was held to pass the fee-simple of the real estate.

The words there are not stronger than in this will. The words of the will are sufficient to convey a fee, if the Court can see that the testator has manifested an intention to convey the fee. *Doe v. Gillard* (e) is an authority for that position. In that case no such intention was manifested. The testator has charged the real estate with the payment of his debts. Nothing is better established than that such

(a) Noy, 48.

S. C. Prec. Cha. 471.

(b) 12 Mod. 593.

(d) 4 Russ. 348.

(c) 1 Eq. Ca. Abr. 209, c. 13;

(e) 5 B. & Ald. 785.

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general words will charge the real estate. The general rule is, that a general direction by a testator that his debts shall be paid, charges the real estate with the payment. There are two exceptions to this rule: first, where the testator has provided a specific fund for the payment of his debts; and secondly, where the executors are directed to pay the debts, and no real property is devised to them (*a*). But where the executor is the devisee of the real estate, and he is directed to pay the debts, the real estate is charged with the payment of them. *Awbrey v. Middleton* (*b*), *Alcock v. Sparhawk* (*c*) clearly establish this distinction. Then if the executor takes any estate, it must be the fee simple; for to pay the debts it may be necessary to sell the estate, and for that purpose it is necessary that the executor should have the fee. *Goodtitle v. Maddern* (*d*).

*Cur. adv. vult.*

Lord DENMAN C. J. on this day delivered the judgment of the Court.

This was a motion, by leave, to enter a verdict for the defendant, as devisee of plaintiff, under a will, which, after directing all the testator's debts and funeral expenses to be paid by his executor, giving several annuities for life, and bequeathing 5*s.* to the plaintiff, who was his heir at law, concluded by appointing "the defendant his whole and sole executor of all his house and land situate at B."

We do not think it needful to go into the authorities which have been so recently considered by the Court, in the case between *Doe d. Hickman v. Haslewood* (*e*). It was admitted by the learned counsel for the plaintiff, and is perfectly clear, that if the defendant took any interest, it must be a fee simple, and no man applying common sense to the con-

(*a*) Powell on Devises, by Jarman, p. 655.

(*b*) 2 Eq. Ca. Abr. 497, c. 16;  
4 Vin. Abr. Charge (D.) 460, pl. 15.

(*c*) 2 Vern. 228; S. C. 1 Eq. Ca. Abr. 198, case 4.

(*d*) 4 East, 496.

(*e*) *Ante*, p. 352.

struction of the will can doubt that the estate was given to the defendant. No decided case opposes any obstacle to our arriving at this conclusion, and the rule must be made absolute.

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Rule absolute.

**THE KING v. THE POOR LAW COMMISSIONERS.**

**THE** Poor Law Commissioners, acting under the 4 & 5 Will. 4, c. 76, on the 16th March, 1836, issued an order under their hands and seals, to the parish officers of the parish of St. Pancras, whereby they ordered that the laws for the relief of the poor of the said parish should, from and after the 14th of April then next, be administered by a board of guardians, consisting of twenty members; and they then prescribed the mode in which such board of guardians should be elected and constituted.

The board of directors of the poor of St. Pancras, acting under the 59 Geo. 3, c. xxxix. and the 1 & 2 Will. 4, c. 60, (*Hobhouse's* act) conceiving the 4 & 5 Will. 4, c. 76, did not apply to parishes like St. Pancras, with a select vestry, objected to the jurisdiction of the Poor Law Commissioners, upon which a case was drawn up and laid before counsel, who concurred in thinking that the Poor Law Commissioners might compel the election of a board of guardians in St. Pancras, under the 4 & 5 Will. 4, c. 76. The Poor Law Commissioners thereupon issued an order, dated the 25th April, 1836, which, after revoking their order of the 16th March last, proceeded as follows:—"And we do hereby order and declare that the laws for the relief of the poor in the parish of St. Pancras, in the county of Middlesex, shall, from and after the 11th May next, be administered by a board of guardians, consisting of twenty members, and that such board of guardians shall be elected and constituted according to the provisions of the Poor Law Amendment Act, and in manner hereinafter set forth."

The Poor Law Commissioners have no powers under the 39th section of 4 & 5 Will. 4, c. 76, (the Poor Law Amendment Act) to make an order for the election of a board of guardians in a parish where the administration of the poor laws is already in the hands of a board of directors, under a local act. *Williams J. dissentiente.*

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An election of guardians was afterwards made on the 9th May following, in pursuance of the above order; but on the attendance of an Assistant Poor Law Commissioner, at a meeting of the said guardians, on the 2d of June following, which, by a previous order, he had directed to be held on that day, the persons elected guardians (and who were all members of the board of directors, previously elected in the parish) refused to act as guardians, pursuant to their appointment; and it was then agreed, that the question should be brought before this Court by an application for a mandamus.

Sir *J. Campbell* A. G. on the first day of this term accordingly obtained a rule, calling upon the guardians of the poor of the parish of St. Pancras, elected and appointed by virtue of the 4 & 5 *Will.* 4, c. 76, to shew cause why a writ of mandamus should not issue, directed to them, commanding them to obey a certain order, under the hands and seals of the Poor Law Commissioners, &c.

Nov. 23d. Cause was shewn on a subsequent day (a) in Michaelmas term against this rule by Sir *F. Pollock*, *Prendergast*, *Austin* and *Thomas*; but it having been suggested by the Court that it would be more convenient to hear the question discussed on a motion for a certiorari, Sir *F. Pollock* moved for a writ of certiorari to remove the order of the 25th April last into this Court.

The grounds of the motion given in the notice, according to the 106th section of the 4 & 5 *Will.* 4, c. 76, were in substance as follows:—"That there being already a board of directors acting under 59 *Geo.* 3, c. 59, and 1 & 2 *Will.* 4, c. 60, the Poor Law Commissioners have no power under 4 & 5 *Will.* 4, c. 76, or any other act, to interfere with or change the local government of this parish, there being no clause in the 4 & 5 *Will.* 4, c. 76, which either expressly or by implication repeals the 1 & 2 *Will.* 4, c. 60,

(a) Before Lord *Denman* C. J., *Patteson*, *Williams*, and *Coleridge* Js.

which was adopted by the rate-payers of St. Pancras in 1832; but on the contrary, the 4 & 5 *Will.* 4, c. 76, confirms the powers vested in the directors of the poor, for the ordering, giving, and directing, all relief to the poor; and further, that if the Poor Law Commissioners have any authority by virtue of 4 & 5 *Will.* 4, c. 76, s. 41, they have not complied with or proceeded with the election of such guardians, according to the directions of the said 41st section; not having obtained the majority of the votes of the owners of property and rate-payers, as by the 41st section they are directed to do, before proceeding to an election of guardians, or directing alterations in the number, mode of appointment, removal, and period of service of the said guardians."

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Sir J. Campbell A. G., Sir W. W. Follett, Wightman, and Tomlinson, in pursuance of 106th section of the 4 & 5 *Will.* 4, c. 76, shewed cause against this rule in the first instance (a).

Sir F. Pollock, and Prendergast, (with whom were Austin and Thomas) were heard, contra.

Adams Serjt., appeared for the ex officio guardians, to receive the directions of the Court.

*Cur. adv. vult.*

In the course of this term the learned judges delivered their judgment *seriatim*.

COLERIDGE J.—This was a case in which the Poor Law Commissioners for England and Wales shewed cause, in the first instance, under the 106th section of the 4 & 5 *Will.* 4, c. 76, against a rule for a certiorari to remove, for the purpose of quashing an order issued by them to the

(a) The arguments used on this motion, and on the rule for a mandamus, are so fully given in the judgments of the learned judges, that it has been deemed needless to repeat them.



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board of directors for the parish of St. Pancras, by which they were directed to elect twenty guardians of the poor for that parish; and the question for our decision is the validity of that order under the circumstances, few in number, which I am about to state.

At the time of issuing the order, the parish was, and ever since the passing of the 59 Geo. 3, c. xxxix, a local act, had been, under the government of authorities constituted by that act with various powers, and, among others, with that of administering the relief of the poor; and a board of directors, forty in number, were entrusted with the immediate management of that relief. It is contended, on the part of the vestry, that this local act prevents the Commissioners from constituting a new board of guardians of the poor. On the part of the Commissioners it is urged, that that circumstance does not deprive them of the power which they derive for this purpose, from the 39th section of the act. It is enacted by that section, "that if the Commissioners shall, by any order under their hands and seals, direct that the *administration* of the laws for the relief of the poor of any single parish *should be governed and administered* by a board of guardians, then such board shall be elected and constituted, and authorized and entitled to act for such single parish, in like manner in all respects as is hereinbefore provided in respect to a board of guardians for united parishes; and every justice of the peace resident therein, and acting for the county, &c., shall be and may act as an *ex officio* member of the board."

The whole question turns upon the meaning properly to be given to this section. It will be observed, that it does not in direct terms give the power of constituting a board of guardians in single parishes, but rather seems directed to the election and attributes of such board, if they shall exercise the power of erecting one. But assuming, as I think we must, and which has not been contested in the course of the argument, that the grant of such a power to the Commissioners must be implied from the language

of this section, I do not see how it can be denied that the words, entirely unrestrained as they are, are large enough to extend to single parishes, under whatever circumstances they may be, and so to authorize the order in question with regard to St. Pancras.

It is in my opinion so important for the Court, in construing modern statutes, to act upon the principle of giving full effect to their language, and of declining to mould that language in order to meet either an alleged convenience or an alleged equity, upon doubtful evidence of intention, that nothing will induce me to withdraw a case from the operation of a section which is within its words, but clear and unambiguous evidence that so to do is to fulfil the general intent of the statute; and also that to adhere to the literal interpretation, is to decide inconsistently with other and over-ruling provisions of the same statute. When the evidence amounts to this, the Court may properly act upon it; for the object of all rules of construction being to ascertain the meaning of the language used, and it being unreasonable to impute to the legislature inconsistent intents upon the same general subject-matter, what it has clearly said in one part must be the best evidence of what it has intended to say in the other; and if the clear language be in accordance with the plain policy and purview of the whole statute, there is the strongest reason for believing that the interpretation of a particular part inconsistently with that, is a wrong interpretation. The Court must apply in such a case the same rules which it would use in construing the limitations of a deed; it must look to the whole context, and endeavour to give effect to all the provisions enlarging or restraining, if need be, for that purpose, the literal interpretation of any particular part. Upon an attentive consideration of the several clauses of this statute, a consideration necessarily the more attentive, because one of my learned brothers has formed a different opinion, it seems to me that the general words of the section in question must receive a restrained construction. It will be necessary, in order to justify this

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opinion, to examine the statute more in detail than I could have wished; but before I do so, I think it right to premise a remark, which must be borne in mind, in order to give to the evidence resulting from this examination its due weight. The remark is this, that we are dealing with a statute which has reference not so much to the common law as to a large number of previous statutes; that its general intent is in accordance with them, except where it marks out in express language their partial repeal or modification. I find it, therefore, more difficult to adopt that construction, which supposes an intent to repeal them as to other important, but unspecified provisions by implication. The large and literal interpretation of this clause will certainly become more improbable, if it shall appear to be at variance, not only with the clear intent and meaning of other unambiguous clauses in the same statute, but if it will also have the effect of repealing in part a former statute, one of a class too manifestly in the contemplation of the legislature, when this act was framed, expressly subjected to its operation in some particulars, and expressly saved from it in the main. In the case of *Williams v. Pritchard* (a) Lord Kenyon uses language applicable to this part of the subject. "It cannot be contended that a subsequent act of parliament will not control the provisions of a private statute, if it were intended to have that operation; but there are several cases in the books to shew that where the intention of the legislature was apparent, that the subsequent act should not have such an operation there, even though the words of such statute, taken strictly and grammatically, would repeal a former act, the Courts of Law, judging for the benefit of the subject, have held that they ought not to receive such a construction."

The first section, to which it is important to look in this examination, is the fifteenth, which describes generally the powers and duties of the Commissioners. By this, although the administration of relief to the poor is made subject to

(a) 4 T. R. 3.

their direction and control, yet that is still to be according to the existing laws, or such laws as shall be in force at the time being. And they are empowered to issue orders for the guidance and control of all guardians, vestries, and parish officers. The term "guardian," by the 109th section, (the interpretation clause,) including "any visitor, director, or other officer in a parish, appointed to act as a manager of the poor, and in the distribution or ordering of the relief to the poor, under any local act of parliament." The directors, therefore, of St. Pancras, may be guided and controlled under this section; but the management of the poor cannot be taken from them.

The 21st section, which is the next affecting this question, is more explicit to the same purpose; for it enacts, that, except where otherwise provided for by the act, all the powers given by any act of parliament, general as well as local, "in any way relating to the relief of the poor, shall in future be exercised by the persons authorized by law to exercise the same, under the control, and subject to the rules, orders, and regulations, of the Commissioners; and they and the assistant Commissioners shall be entitled to attend at every parochial and other local board and vestry, and take part in the discussions, but not to vote."

The 22d section restrains the authorities under any local act relating to the relief of the poor, from making henceforward any new rules, orders, or regulations, until the same shall have been submitted to and approved and confirmed by the Commissioners.

Thus far it cannot be doubted that the express object of the statute is to obtain an improvement and uniformity in the management of the poor, not by creating any new machinery in the parishes, but by preserving that which existed, whether under general or local acts, and submitting it to the guidance and control of the Commissioners.

By the 26th section the Commissioners are empowered "to declare so many parishes as they may think fit to be united for the administration of the laws for the relief of the

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poor;" and by sect. 32, "from time to time to dissolve, add to, or take from, any union, whether formed before or after the passing of the act, provided that 'no such dissolution, alteration, or addition' shall be made unless two-thirds of the guardians of such union shall concur therein." The 38th section enacts, "that wherever a union shall be formed by order or with the concurrence of the Commissioners, a board of guardians shall be constituted and chosen for such union, and the relief of the poor in such union shall be administered by such board."

These sections, from the 26th to the 38th inclusive, with the intermediate and unnoticed sections, extend the powers of the Commissioners to the constitution, dissolution, and alteration of parochial unions, and to the establishment of boards of guardians; but it is remarkable, that when they come to the alteration of existing unions, they cannot proceed without the consent of two-thirds of the guardians already constituted.

The 39th section, on which the question turns, follows. I have already stated it. It appears to me, that no one reading it, even by itself, would suppose it *intended* to apply to any single parish in which the administration of the Poor Laws was already in the hands of a board of guardians: the obvious intention seems to be, merely to give the Commissioners the power to introduce the same system of government, by a board of guardians, into single parishes in which it did not exist before, as they were directed to introduce into the unions, which they should form or concur in forming. The argument to be derived from this is not without strength in itself; it is founded on the very words and form of expression used in the section, but it receives a great increase of force when it is found to harmonize so exactly both with the constitutive and conservative parts of the previous sections of the act. It agrees with the former in enabling the boards to be established where none existed before; with the latter, where such a board exists, in leaving the persons authorized by law, in the language of the 21st

section, to exercise the powers of their local act relating to the relief of the poor in both cases; still effectuating the main object of the act, that all shall be under the guidance and control of the Commissioners.

A few sections however still remain to be noticed, which serve to throw a stronger light upon the true meaning of this section. The 40th enacts and describes in detail, a new mode of voting, which is to be observed in all cases of the election of guardians under this act; and the 41st section enacts, in express terms, that all elections of guardians under any local act shall hereafter, so far as the Commissioners shall direct, be made and conducted according to the provisions of this act. It may reasonably be asked, why introduce this express power to regulate the elections of these local boards, if they held their existence as boards for the management of the poor only at the pleasure of the Commissioners? But to this clause is attached a proviso still more important to the argument; by this the Commissioners are empowered to make such alterations in the number, mode of appointment, removal, and period of service, of the guardians, or any of them, of any parish or existing union, as to them shall seem expedient; *but this only with the consent of the majority of the owners and rate-payers.* Can they then make such alterations as above specified only with the consent of the parish—and may they destroy the same board by their mere order? It was urged, I am aware, that the present order does not destroy the local board in St. Pancras, that the management of the poor was but one of its functions, and that it will still subsist for many important purposes. I do not stop to notice the inconvenience of this double machinery; but in truth, is the fact alleged in this particular case any answer to the general argument? Those who contend for the validity of this order, must maintain that the Commissioners would equally have had the power to issue it if the local board had existed *only* as a board for the management of the poor, and then

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they must have contended that those could destroy at pleasure, who could only alter by consent.

I have carried this examination far enough to satisfy my own mind that this order is not warranted by the statute. I am not unaware of the forcible remarks to which the general words of the 39th section, and, perhaps, of some other clauses, may give rise; and I have come to a conclusion, which goes to restrain those words very reluctantly. But the sum of the arguments to which I have been obliged to yield, is this—the clause itself appears, on the reading it by itself, not to have been intended to apply to cases of parishes with existing boards; then I find that to construe it as not having that application, makes it agree with a prevailing tendency in the other sections not to destroy existing boards or repeal local acts, but to make them subserve the general policy of the act, by putting them under the guidance of the Commissioners, making its provisions in certain specified matters override those of the existing statutes, but in general adopting and harmonizing with them. I further find, that to suppose the section intended to destroy such boards, is to make it at variance with many sections which either provide for or directly contemplate their continuance; and I lastly find a provision with respect to the future elections and possible alterations by consent in the number and period of service of the members, which seems wholly inconsistent with the notion that the future existence of the board was entirely at the discretion of the Commissioners.

If the 39th section had contained the words, “whether in such parish there be or not any existing board of guardians,” or any equivalent words following the words, “any single parish,” no argument could have arisen; but I should have found it impossible to reconcile all the clauses as I now can. No such words are there, and I cannot conceive that they are omitted either inadvertently or with intent to give to the Commissioners, covertly, a power over a large number of parishes, and those the most populous and influential, which, if conferred in express terms, would undoubtedly

have occasioned much question. Upon the whole, I am of opinion that this order must be quashed.

WILLIAMS J.—I have the misfortune to differ from the rest of the Court, and therefore it is a satisfaction to me that the result will not be affected by that circumstance. The question before the Court is, whether the order of the Poor Law Commissioners, already referred to, can be sustained; and that depends upon the proper construction of the 38th & 39th sections of 4 & 5 *Will.* 4, c. 76, (particularly the latter) considered, I agree, in connection with the other parts of the act. The general object of it certainly is to bring the administration of relief to the poor, throughout the country, under the order and disposition of the said Commissioners; and very large and extensive powers are unquestionably conferred upon them for that purpose. The first fourteen sections of the act relate to the appointment of Commissioners and Assistant-Commissioners; and in the 15th section the power alluded to is thus given: viz. “the administration of relief to the poor according to the existing laws, or such as shall be in force at the time being, shall be subject to the direction and control of the said Commissioners;” and there are enumerated a variety of particulars which are embraced in the above description, including the power of making rules, orders, and regulations for the guidance and control of all guardians, vestries, and parish officers. Now this section, which is certainly one of the most important ones in the act, seems to me to have for its object only to give power to the Commissioners over the actual managers of the poor in each parish and district, and to have no reference to any *particular* descriptions of managers, or to the mode of their appointment. And accordingly we see in the explanatory clause (s. 109) that the word “guardian” means throughout the act *any* visitor, governor, or director; in short, any person intrusted with the management of the poor. It seems to me important to bear in mind the precise object of this section, because the

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mode of election is made the subject of very particular and minute regulations in the 40th section, and the right of voting there prescribed, differs, so far as I am aware, from any before in use in this country—I allude to the right of voting conferred upon the owners of property, which though not practised here, has, it is said, been long prevalent in Scotland. The 26th section empowers the Commissioners to declare so many parishes as they may think fit united for the administration of the laws for the relief of the poor; and by sections 33 & 34 powers are given to the guardians of any union, with the consent of the Commissioners, to make such union one parish, for purposes of settlement and of rating, and by the 37th, certain unions, without consent of the Commissioners, are prohibited. Then comes the 38th & 39th sections, upon which the question mainly turns. Before adverting to them, however, it is material to notice the general power of forming unions under the 26th section, because the unrestrained nature of it (as I understand its language) seems to me to throw some light upon the 39th section, where the power of the Commissioners is to be considered in the case of a single parish. Now the 26th section runs thus: “It shall be lawful for the said Commissioners, by order, to declare so many parishes as they may think fit to be united for the administration of the poor, and such parishes shall thereupon be deemed a union for such purpose, &c.” There is no exception, no restraint; and accordingly it seems to me, that the most obvious and manifest repugnancy in other parts of the act to the general meaning of this clause should be pointed out, before we are authorized to read it as if after the word “parishes” had been introduced, “except such as are governed by a local act.” It seems to me, I confess, to include all of every description. By the 38th section it is provided, that in all cases of union under the 26th section, (the generality of which I have noticed) by the order or with the concurrence of the Commissioners, a board of guardians of the poor *shall* be constituted and chosen, and the government of the

workhouses, and administration of relief of the poor, shall be under the control of such guardians, and the said guardians *shall* be elected by the rate-payers and owners of property. Then follow the regulations before alluded to, as to the mode of voting, with limited powers to the Commissioners as to the number of guardians; which number however they cannot reduce below one for each parish of the union. It is necessary to advert thus much to the provisions of the 38th section, although the question arises immediately upon the 39th, because the former is in the most essential part directly incorporated in the latter. The clause is in the following words, (his lordship here read the 39th section). The effect of the order in question is to reduce the number of persons from 40, the present number of directors under a local act governing the parish of St. Pancras, to 20, and to introduce the new mode of election prescribed by the 40th section. The effect is not *necessarily* to produce any greater change. By the new mode of election, for any thing that appears, the 20 to be chosen may be out of the present 40 directors. The change therefore would be only in the number of persons to whom the management is deputed. Whether those persons be 20 under the newly prescribed form of election, or the 40 directors under the local act, it is, I think, unquestionable that "rules, orders, and regulations," for their guidance and control, may be equally issued by the Commissioners; and it is probable, to say no more, that the same rules would be issued whichever management may prevail. I notice this in passing, for the purpose of shewing that the question is probably not quite of so much importance as has been attributed to it. The question itself of course remains the same, and it is as I at first stated it.

The language of the 39th section is certainly very large and general. There is no restriction expressed (as I have already observed is the case with respect to what I consider the corresponding power of forming unions under the 26th section), although it is obvious how easily and briefly such

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restriction might have been introduced to prohibit the interference of the Commissioners in the case of a parish governed by a local act. Where the words "single parish" are introduced, there is no such exception, nor any proviso to produce the same effect, fertile as the act is of provisos, some of them too, as were pointed out by my brother *Patterson*, of a novel and extraordinary description. In estimating the effect to be given to this general language unrestrained, as has been observed, it is impossible to overlook entirely the new mode of election introduced by this act, combined with a power of regulating the number to be elected. How far it may have been the policy of the legislature, by this provision, to extend to all parishes (however circumstanced) the benefit of this plan, and what degree of importance was attached to it, I am not prepared to say. Certain, however, it is, that in proportion as the power of the Commissioners is extended, this mode of election, with the control above mentioned, is extended likewise.

The 41st section was much relied upon against the order. (His lordship read it.) From this it appears that the Commissioners may, in the case of guardians of a parish or union (existing at the time of its passing), *under the said act, appointed* by the consent of such majority as is there mentioned, make alterations in the duration of the service of guardians, and also "to make such alterations in the number, mode of appointment, removal, and period of service of the guardians, or any of them, of any parish or of any union now existing or to be formed under the provisions of this act, as to the Commissioners, with such consent, shall seem expedient." And the argument was, that it is strange, and seems inconsistent, that the Commissioners should have power, by resorting to the measures which they are authorized to take under the 38th and 39th sections, at their own discretion, to require a new election of guardians under the new mode. Whereas by the section under consideration, they cannot make even alterations

without the consent therein specified. It is to be observed, however, that the first branch of this (41st) section speaks of guardians *appointed under this act*, and if so, it includes those appointed under the 38th section, over which appointment, though *the election* be with owners of property and rate-payers, the Commissioners have a power as to the number and qualification of the guardians. I cannot therefore see that it is necessarily inconsistent, or undertake to say that the legislature might not have meant that the Commissioners, having once exercised their authority at the original election as to the number of guardians, should not be allowed to disturb it, or again to interfere without the consent specified in this 41st section. The latter branch of this same section has the words "guardians of any parish or union now existing," without the addition of the words "appointed under this act;" and as they are omitted, and as the power of the Commissioners is somewhat different from that conferred upon them in the earlier part of the section, I presume that these latter words must be understood to mean any "managers" of the poor existing at the time of the passing of the act: the interpretation clause (as already observed) having so defined the meaning of the word "guardian," still the Commissioners need not interfere; and if they see nothing wrong in the actual management, it is perhaps difficult to discover any good reason why they should. Whether in the present instance, or any other, it be wise or politic to do so, is another question with which we have no concern. I am, however, by no means satisfied that the meaning of the legislature in this latter branch of the section now under consideration may not have been, that if the Commissioners so far testified their approbation of the existing authorities and management in any given parish, as not to deem it necessary either to throw it into a union under the 26th section, or (if the phrase may be allowed) to make it an *independent union* under the 39th, they should not be allowed to make any alterations at all without the consent in this 41st section

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specified. If the latter branch of the section be the same in construction as the first, then the observations made upon the former branch are applicable to the whole.

The 54th section was also brought under our notice, as being opposed to the validity of the order. It seems necessary, in order to form a proper estimate of the bearing of this section, to advert to the preceding, the 53d. That repeals three distinct acts of parliament, viz. 36 Geo. 3, c. 23, the 55 Geo. 3, c. 137, and the 59 Geo. 3, c. 12. By the first of these acts, the overseers, under certain circumstances, were allowed to give relief to poor persons at their own homes, and by all three a similar power was given, under more or fewer restrictions, to a justice or justices of the peace. The object of course was to take away all these powers, and that being effected, the 54th section enacts, that where there is any body entrusted with management of the poor, whether guardians, select vestry, or however composed, the ordering of relief shall be vested in that body alone. There is a saving of the powers conferred upon the Commissioners by the act; but independent of this, the view and object of the section seems to me to be what I have mentioned, and not to bear upon the precise question of the power of the Commissioners in this instance. Whether the old board of directors in the parish of St. Pancras should remain, or whether there be an election under the new method prescribed by the act, this power, as contrasted with the overseers and justices of the peace under the repealed statutes above mentioned, would, as it seems to me, be vested equally in either. It was further urged in argument, that the order cannot be sustained, because it directs a board to be constituted of the description therein mentioned. Whereas there is already a board existing. But taking the whole order together, it seems to me to appear sufficiently that the board mentioned in the order is a board to be appointed under the new mode of election prescribed in the 40th section, which must differ in number from the existing one, and may differ also as to

the persons of whom the more limited number is composed, according as twenty of the present persons may or may not be re-elected.

For these reasons, such as they are, and without my placing any thing like implicit confidence in them, it seems to me that the express words of the 39th section, enjoining that where an order of the Commissioners shall direct "that the laws for the relief of the poor of *any single parish* shall be governed by a board of guardians, then such board *shall* be elected and constituted, and authorized and entitled to act for such single parish, in like manner as in the 38th section is provided," are not so far varied or contradicted by any conflicting enactment as to prevent them having the effect which, taken by themselves, they import, and that therefore the order may be sustained.

PATTERSON J.—This is an application for a writ of certiorari to remove an order of "The Poor Law Commissioners for England and Wales," into this Court, under the 105th section of 4 & 5 Will. 4, c. 76; and cause was shewn in the first instance, under the 106th section of the same act, empowering the Court forthwith to hear and determine the same.

The order bears date the 25th April, 1836, and is signed by the three Commissioners and under their seal, and by it they order and declare that the laws for the relief of the poor of the parish of St. Pancras shall, after the 11th day of May next, be administered by a board of guardians, consisting of twenty members, and that such board of guardians shall be elected and constituted according to the provisions of the Poor Law Amendment Act, and in manner thereafter set forth. The laws for the relief of the poor in the parish of St. Pancras were at that time administered by a board of directors, consisting of forty members, under a local act affecting that parish only.

The order is issued under the 39th section of the 4 & 5 Will. 4, c. 76, which enacts, "that if the said Commis-

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sioners shall, by any order under their hands and seal, direct that the administration of the laws for the relief of the poor of any single parish should be governed and administered by a board of guardians, then such board shall be elected, constituted, and authorized and entitled to act for such single parish in like manner in all respects as is hereinbefore enacted and provided in respect to a board of guardians for united parishes; and any justice of the peace resident therein, and acting for the county, riding, or division in which the same is situated, shall be and may act as an ex officio member of such board." The language of this section, it may be observed, does not in direct terms give the Commissioners power to order that the poor laws shall be administered by a board of guardians in a single parish, but enacts, that if they shall so order, the board shall be elected in the same manner as a union board. The power, however, seems to be necessarily implied. The order is resisted upon the ground that this section was not intended to apply to a single parish governed by a local act, and having already a board of guardians or directors, which for this purpose is the same thing, but only to such single parishes as were under the ordinary government of overseers, and as the Commissioners might think not proper to be joined with other parishes in a union.

The Court is now called upon to construe this section, and is urged to decide, from the generality of the expressions used in it, that it applies to all parishes without any limitation, and that it necessarily gives an implied power to the Poor Law Commissioners to repeal, at their will and pleasure, all local acts, so far as they regard the administration of the poor laws; for that such would be the effect of the construction prayed for, is undeniable.

If the legislature intended to give so extensive a power to the Commissioners, it might reasonably have been expected that it would have done so in express terms; and accordingly, in the 41st section, a power of altering the mode of election under local acts is given in express terms.

Even without express terms, if the 39th section would be inoperative unless such construction were put upon it, the Court might be compelled to infer that such a power was implied. If, however, the section can be made fully effectual by a more limited construction, there can be no conclusive proof that the more extensive power was contemplated by the legislature ; and if such limited construction should appear to be in accordance with the other sections of the act, the Court might possibly, if it were to decide in favour of the power claimed by the Commissioners, give that which the legislature intentionally withheld.

One of the main objects of the act appears to be to provide for a uniform administration of the poor laws. With this view the 15th section enacts, that the administration of the poor laws, according to the existing laws, shall be subject to the direction and control of the Commissioners, and a general power is given to them to make rules for the guidance and control of all *guardians, vestries*, and parish officers, in the management of the poor, the audit of accounts, entering into contracts, and carrying the act into execution—the Commissioners prescribing the method, but the guardians or other bodies performing the actual duty. And section 21 expressly enacts, that, except where otherwise provided by this act, all powers given by any general or local act relating to the relief of the poor, shall be exercised by the persons authorized by law to exercise the same, under the control and subject to the rules of the Commissioners.

Now these sections point at the continuance of existing guardians, and other officers, subject to the control of the Commissioners, while no express authority is given to them to dismiss any guardians, or to repeal the provisions of any local act, either by these or any other sections of the act. Section the 26th empowers them to unite parishes. [His lordship here read the words of section 26.] The words here are as general as can well be conceived ; they give the power in distinct terms, and would appear to apply to

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all parishes throughout the kingdom, containing no exception of parishes already united; and yet it must be read with such exception and limitation; for by section 32, the Commissioners are prohibited from dissolving or altering existing unions, without the consent of two-thirds of the guardians. The generality of the words of any section in this act is not, therefore, conclusive as to the real meaning of that section. By the 38th section, a board of guardians must be constituted for every union of parishes established under this act; but no mention is made of any new board in the cases of existing unions.

Next comes the 39th section, on which the case depends. The immediate object of this section, as it seems to me, is to enable the Commissioners to cause the poor laws to be administered by a board of guardians in a single parish, without driving them to the necessity of uniting that parish with one or more others, for the purpose of having such a board. The legislature might well consider that some parishes are so large and populous that the Commissioners might judge it expedient that they should not be united with any other, and yet that the poor laws ought to be therein administered by a board of guardians. It is, however, contended, that, under this section, the Commissioners have powers, where a board of guardians, under a local act, already exists in a single parish, to supersede the board so far as regards the administration of the poor laws, and to order a new board to be elected under this act. It is conceded that the old board must in most instances remain, having other duties besides the administration of the poor laws, though no words are pointed out leading directly to any such conclusion. The 40th section regulates the mode and scale of voting, giving owners as well as occupiers the right of voting, thereby introducing a new class of voters, unheard of before, and also regulating the number of votes which each person shall have by the value of his property, which scale of voting appears to be a favourite object throughout this act.

The 41st section enacts, " that all elections of guardians,

visitors, and other officers, for the execution of any of the powers or purposes of the said recited act, made and passed in the twenty-second year of the reign of his said late Majesty King George the Third, intituled, 'An Act for the better Relief and Employment of the Poor;' or of any local act of parliament relating to poor-houses, work-houses, or the relief of the poor, or any act to alter or amend the same respectively, shall hereafter, so far as the said Commissioners shall direct, be made and conducted according to the provision of this act, provided always that it shall be lawful for the said Commissioners, if they shall so think fit, *from time to time, with the consent of the majority of the owners of property, and rate-payers of any parish*, or of any union now existing, or to be formed under the provisions of this act, to *alter* the period for which the guardians to be appointed under the provisions of this act, for such parish or union, or any of them, would, under the provisions of this act, hold office, for such other period or periods as to the said Commissioners, with such consent as aforesaid, shall seem expedient; and *also to make such alteration* in the number, mode of appointment, removal and period of service of the guardians, or any of them, of any parish or of any union now existing, or to be formed under the provisions of this act, as to the said Commissioners, with such consent as aforesaid, shall seem expedient." This section is not very intelligible; but this much is clear, that an existing board of guardians of a parish, under a local act, may be continued; that the mode of their election may be altered by the Commissioners of their own authority; but their number, mode of appointment, removal, and period of service, cannot be altered, except by consent of a majority of owners and rate-payers, and the board will be under the control and subject to the rules of the Commissioners. It is not denied that the Commissioners may so continue an existing board; but it is said that they are not obliged to do so by reason of the generality of the words of the 39th section; and that they have the option either to con-

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tinue and modify the existing board, under the 41st section, or to abolish it altogether under the 39th. No such option is given to them as to existing *unions*, notwithstanding the general words of the 26th section. Nor can I see any thing to lead me to the conclusion that it was intended by the legislature to give such option as to single parishes, except the general words of the 39th section. The 54th section again speaks of guardians under local acts exercising powers, but saves the power of the Commissioners.

Upon the whole of this act it appears to me that the legislature intended to make use of all existing boards of guardians or directors, (for their appellation makes no difference,) to subject them to the control of the Commissioners, and to alter the mode of their election at the discretion of the Commissioners; but not to abolish any of them, or alter their number, without the consent of the majority of the owners and rate-payers.

It further intended to enable the Commissioners to unite parishes and constitute boards of guardians in single parishes, not already having boards. But I cannot any where find any words authorizing the abolition of a board of guardians, (except in the case of a dissolution of an existing union by consent,) nor the taking away from an existing board of guardians any power they possess by law, or any part of their authority. On the contrary, I see a manifest intention throughout to preserve existing boards, and no allusion to there being in any instance more than one board in a parish or union. The control given to the Commissioners is abundantly sufficient to secure uniformity of administration by existing bodies, regulated in their election by the provisions of this act. I am not prevented from giving effect to that which I conceive to be the intention of the legislature, by the generality of the words in the 39th section, because I find equally general words in another section, the 26th, which must of necessity have a limited construction. I have endeavoured, by a close examination of all the provisions of this act, to discover what the legislature really meant in

the 39th section; and I believe that my interpretation of that section is according to their real meaning; but I feel diffident on the subject, on account of the different opinion which my brother *Williams* entertains. If I am wrong, and if the legislature meant to give this large power to the Commissioners, it is very easy for them to pass an act to that effect, which may be clear and unambiguous in its terms. For these reasons I am of opinion that the 39th section, although general in its terms, does not apply to parishes having already a board of guardians or directors, under a local act, and that the order of the Commissioners, of April, 1836, is illegal.

Lord DENMAN C. J.—The question arises upon section 39, which follows a provision for enabling the Commissioners to direct the rate-payers to proceed to the election of a board of guardians, according to a new right of voting,—a provision which applies where several parishes have been united with consent of the Commissioners.

The 39th section extends their power to single parishes, “If the said Commissioners shall, by any order under their hands and seal, direct that the administration of the laws for the relief of the poor of *any single parish* should be governed and administered by a *board of guardians*, then such board shall be elected and constituted for such single parish, in like manner” as the previous section provides for a union.

The order is said to be illegal, because a board of guardians already existed in the parish of St. Pancras at the time it was issued. The parish governed by a vestry appointed under a local act, and having adopted the provisions of the General Vestry Act, is already in the situation in which the order seeks to place it. That which the Commissioners are empowered to effect by their order is done to their hands by two unrepealed acts of parliament. The generality of the enactment is said to be limited by its object. This argument is, indeed, charged with engrafting

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upon the act a qualification of its terms, confining them to *such* single parishes as are not governed by local acts; but on general principles of construction it is contended that an act which authorizes me to change parishes from their present state of things to a new, cannot give that authority in respect to one in which the present state of things is that described as the new. On the other hand, in addition to the very large words that occur in the act, it is urged that the description of that board which the Commissioners have power by the 38th clause to introduce, is differently constituted from the local board now existing for the parish of St. Pancras, and from the juxta-position of the two clauses, an intention to confer precisely the same power by both clauses is inferred. In this controversy I am bound to aim at the just construction of this clause, and upon the whole I think that construction is unfavourable to the present order.

For it seems to me that a restriction of the power to create boards to such parishes as have none, is the natural, if not the necessary, import of the words employed. Suppose, for example, that this Court were invested with the same power, and issued a mandamus to make the election, I apprehend that it would be a good return to say, that when the writ was issued there was a board of guardians within a local act. And however strongly I may surmise the existence of the intention ascribed to the legislature, I do not see how it can be effected without introducing words not to be found in the act; for it would then be necessary to add to those actually employed simply "a board of guardians," some expression equivalent to "constituted in the manner prescribed by section the 38th." Taking the bare words of the act the purpose is already accomplished.

The clause, however, is by no means so clear and decisive but that it might probably adjust itself to a general object of the act, pervading all its provision and manifestly present to the mind of the legislature when the particular enactment was framed. And here uniformity in the ma-

nagement of the poor is said to be the leading object, the spirit and principle of the act, to which the letter of every part must be made subservient.

In answer to this observation I say, that large powers are conferred and certain means provided to accomplish this general purpose. The Commissioners have a right to issue regulations and orders for the management of every parish, to interfere in all particular cases, and to be present at the meeting of every governing parochial assembly ; great securities no doubt for one system of management. They are empowered to change the frame and constitution of the managing authorities in the unions mentioned in section 38, and in the single parishes introduced by section 39. That clause may receive full operation in much more than half the single parishes in the country, though such as have local boards are not included in it, and such local boards composed of persons trusted by the parishioners at large, and improved by the act which passes under the name of *Sir John Hobhouse*, may have been deemed so fully adequate to all the purposes of the act as to be exempted from that power of alteration by the Commissioners which has been thought necessary in other cases.

We find accordingly several provisions for preserving the powers and constitution of existing bodies. The 41st section indeed authorizes a complete change by the Commissioners in the mode of appointing and removing guardians, for the execution of any local act, and in their number and period of service ; but this change cannot be wrought by the Commissioners alone, it cannot be without the consent of the majority of the owners of property and rate-payers of the parish. Here the argument against the present order appears to me very strong, for I cannot discover the necessity for this enactment, if the Commissioners possessed the power already, to be exercised by the simple declaration of their will.

The preservation of existing authorities by section 54, weighs less with me, because it is declared to be subject

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to, and saving and excepting the powers granted to the Commissioners, and leaves untouched the question as to the extent of their powers. Yet I think a local board would naturally feel extreme surprise at receiving such an order as that which we are discussing, when they had been told by section 54, that the giving, ordering, and directing relief to the poor of any parish possessing a local board, shall appertain and belong exclusively to the guardians of the poor and select vestry under their own peculiar act. There is a saving of the Commissioners powers, but that saving would strike any ordinary person as applying to their powers of regulation, control, and interference, which otherwise might have been affected by the extensive words here employed.

If in the face of these words it was intended to place the constitution of the board entirely at the disposal of the Commissioners, I think the legislature would and ought to have expressed that design in language open to no doubt or misconception.

Reference was made in the argument to numerous other clauses, many of which have some bearing upon this question, but none that is direct and decisive. They have been observed on by my two learned brothers, with whose opinion I agree, and do not require a more detailed investigation from me.

I cannot conclude without stating, that out of deference to my learned brother, whose views do not coincide with ours, and from feelings of sincere respect to the Commissioners, my brothers *Patteson* and *Coleridge*, and myself, have frequently considered the points involved in the case, and I should have been happy if the result of my opinion had been different. But I am bound to declare it as it is, namely, that the present order cannot be sustained in law.

Rule absolute for a certiorari.

## HODKINSON v. MAYOR.

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Tuesday,  
Jan. 17th.

**DEBT** for penalties on the 12 *Geo. 2*, c. 13, s. 7 (a). The first count stated that the defendant, after the 24 June, 1739, to wit, on the 18th September, 1834, commenced an action or suit, in which *A. B.* was plaintiff, and *W. Hodgkinson*, (the plaintiff in this suit,) defendant, in the County Court of Stafford, the defendant not then being legally admitted an attorney or solicitor, according to the 2 *Geo. 2*, c. 23, by means whereof, and by force of the statute in such case made, *actio accrevit*, &c. Second count stated, that defendant after &c., on 18th September aforesaid, sued out of the County Court of Stafford, a summons against plaintiff in this suit, the said defendant not then being legally admitted an attorney or solicitor, &c.

An attorney who has neglected to obtain his certificate in pursuance of the 37 *Geo. 3*, c. 90, s. 31, is not liable to the penalty imposed by the 12 *Geo. 2*, c. 13, s. 7, for practising in the County Court.

Plea, that the defendant was, at the time of the committing the supposed offences, legally admitted an attorney according to the 2 *Geo. 2*. At the trial at the Stafford Summer Assizes, 1835, before Lord *Denman* C. J. it appeared that the defendant had been duly admitted an attorney in the year 1828, and had taken out his certificates annually, till the year 1832; but that he had neglected to take out any certificate during the years 1833, 1834, 1835. It was also proved that he had practised in the County Court at the time mentioned in the declaration; on these facts a verdict was found for the plaintiff, and leave was given to enter a nonsuit. A rule having been obtained accordingly by

(a) That section enacts, "that in case any person shall, from and after the said 24th day of June, 1739, commence or defend any action, or sue out any writ, process, or summons; or carry on any proceedings in the Court, commonly called the County Court, holden in any county in that of Great Britain,

called England, who is not or shall not then be legally admitted an attorney or solicitor, according to the said act made in the second year of the reign of his present Majesty, that such person shall for every such offence forfeit the sum of 20*l.*," &c.



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Sir *W. W. Follett*, in Michaelmas Term, 1835, on which occasion *Jones v. Stephens* (a) and *Cross v. Kay* (b) were cited,

*Ludlow Serjt.* now shewed cause. It is impossible that the cases cited in obtaining this rule can be relied upon for making it absolute, as the whole result of *Cross v. Kay* (b) was, that the 25 *Geo. 3*, c. 80, does not apply to the Sheriff's Court; and in *Jones v. Stephens* (a) the point ruled was, that the fact of an attorney having been admitted and practising was sufficient *prima facie* evidence of his being an attorney. It is true the case in *Re Hodson and Ross* (c) would appear to be more in point against the plaintiff; but the decision in that case was on a different statute. The issue in the present action was, whether the defendant was an admitted attorney on the 18th day of September, 1834. According to the meaning of the 12 *Geo. 2*, c. 13, s. 7, "every person practising is liable to the penalty, who is not or shall not *then* be legally admitted an attorney." Now by the 37 *Geo. 3*, c. 90, s. 31, every person admitted, who shall neglect to obtain his certificate thereof for the space of one whole year, shall be incapable of practising; and the admission of such person shall from thenceforth be null and void. It was proved that the defendant had for three whole years neglected to take out his certificate, how, therefore, can it be contended, after the express provision of the legislature, that the admission was not void but only voidable. It is quite clear that practising in the County Court comes within the provisions of the 9th section of the 12 *Geo. 2*, c. 13, *Ex parte Flint* (d); and it is also evident that the defendant was practising, not being legally admitted. It is true that the defendant in such a case may be re-admitted, but not as a matter of course, for the re-admission rests entirely with the discretion of the Court. The

(a) 11 Price, 235.

324.

(b) 6 T. R. 683.

(d) 2 D. & R. 406; 1 B. & C.

(c) 4 N. & M. 763; 3 A. & E. 254.

decision of Lord *Lyndhurst* in *Slack v. Wilkins* (a) was approved of in *Re Hodson* (b); and the words of the Lord Chief Baron, were "By not taking out his certificate, therefore, this gentleman's inrolment became and was null and void. He, therefore, did not continue inrolled as aforesaid; and not continuing inrolled as aforesaid, and being proved to have practised, he became liable to the penalties in question." That judgment is decisive of the present case.

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Sir *W. W. Follett*, *contra*. This action is brought to recover a penalty on the 12 *Geo. 2*, which statute requires an attorney to be admitted according to the provisions contained in the 2 *Geo. 2*, c. 23. At the time these two statutes were passed there were no stamp duties imposed on attornies, and the object of the legislature in making those enactments was to prevent improper and ignorant persons from practising as attornies, and to require a certain ordeal of examination to be gone through. It seems, therefore, difficult to imagine how the not having complied with the regulations in fiscal statutes passed subsequently, namely, the 25 *Geo. 3*, and 37 *Geo. 3*, can make the defendant liable to the penalty contained in the previous acts. By the 37 *Geo. 3*, c. 90, s. 31, the admission of a person neglecting to obtain his certificate is declared null and void; but both that statute and the previous one, 25 *Geo. 3*, c. 8, s. 7, imposes a penalty of 50*l.* on any one practising without having obtained his certificate. Now this action does not profess to go upon the stamp acts; and if the defendant had been guilty of the offence mentioned in the above statutes, by the late act, the penalty could only be sued for by the law officers of the crown. [*Coleridge J.* Do those acts impose the penalty for practising in the County Court without a certificate?] They only apply to the attornies practising in Courts where the debt or da-

(a) 1 C. & M. 23.

(b) 4 N. & M. 768; 3 A. & E. 224.

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mages amount to 40s. (a), and therefore do not apply to the County Court. If the plaintiff were to succeed in the present action, the effect would be to make it necessary for parties practising in the County Court to take out the certificate, from which they are expressly exempted by statute. But it is quite clear from the cases, that the neglect to take out the certificate does not make the admission void. In *Coren v. Sharpe* (b), an attorney who had neglected to take out his certificate was held entitled to recover for business done after he had obtained a rule for re-admission, but before he had caused it to be entered at the master's office; and Lord *Tenterden* C. J. said, the act (c) does not say that the name shall be expunged when the party becomes incapable of practising; and in speaking of re-admission, it makes no mention of restoring to the roll or re-swearing." The case of *Hodson and Ross* (d) is still more in point; for there the party had neglected for a year to take out his certificate; and if his admission had been thereupon void, according to the argument on the other side, he would have been liable to the penalty of 22 *Geo. 2*, c. 46, s. 11, but the Court held that the provision in 37 *Geo. 3*, c. 90, s. 31, making an admission null and void as a fiscal regulation, was not to be imported into a preceding statute, the object of which was to prevent unqualified persons from acting. The 12 *Geo. 2*, c. 13, is also a statute to prevent unqualified persons from acting as attornies; the decision therefore in *Hodson and Ross* (d), though on a different statute, is on an analogous one, and governs the present case.

Lord DENMAN C. J.—It seems to me that the decision of this cause in the matter of *Hodson and Ross*, has shown distinctly that the provisions in the 37 *Geo. 3*, c. 90, s. 31, making an admission of an attorney null and void if he has neglected to take out his certificate, is not to be applied to

(a) 25 *Geo. 3*, c. 80, s. 1.

(d) 4 N. & M. 763; 3 A. & E.

(b) 1 B. & Ad. 386.

224.

(c) 37 *Geo. 3*, c. 90, s. 31.

statutes passed previously for totally different objects. That case was much stronger than the present, it is therefore sufficient to say, that looking at the object for which the 12 Geo. 2, c. 23, was passed, the penalty mentioned in the seventh section has not in this case been incurred by the defendant.

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WILLIAMS J. (a)—I am of the same opinion; and on looking at the provisions of the acts which exempt persons practising in County Courts from taking out a certificate, I must say it would be a very harsh extension of a penal statute to hold, that the admission of an attorney who had practised in such a Court, without taking out his certificate, should be null and void.

COLERIDGE J. concurred.

Rule absolute.

(a) *Littledale J.* was absent from indisposition.

DOE *d.* THOMAS GREATREX and two others *v.* HOMFRAY. *Wednesday, January 18th.*

**EJECTMENT** for a house and land in Brecknockshire. At the trial before *Patteson J.* at the Brecon summer assizes in 1835, it appeared that the lessors of the plaintiffs were the trustees appointed by the Court of Chancery, under the will of *John Jones* of Skethrog House, in the county of Brecon, esq. The will was as follows:

“ I give and devise all those my farms, messuages, or tenements and premises, called or known by the several names of Brincaldagan, Brinbailey, Mellin-penlach, Waingog, and Goroy, situate in the parish of Llangamarch, in the county of Brecon, and now in the several occupations of *Isaac*

A testator by his will, after giving a life estate to *J. J.*, in certain lands, devised as follows: “ as to all other freehold estates in the county of B., to the use and intent that *A. B.* or *C. D.*, their executors and administrators, or the executors and

administrators of the survivor of them, shall and may receive and take the rents, issues, and profits of the above-mentioned estates, and pay the same to my son *J. J.* for life, and from and after his decease I devise the same to the heirs of the body of my said son, &c.” It was held, that by this devise the legal estate was vested in *A. B.* and *C. D.* during *J. J.*’s life.

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*Isaacs, Evan Evans, John Reece, and David Davies*, unto my son *James Jones*, To hold to my said son *James Jones*, his heirs and assigns, for ever; and also all other my freehold estates situate in the several parishes of Llsaintfraed, &c. in the said county of Brecon, with their respective appurtenances thereunto belonging, and every part thereof, To the use and intent that the Reverend *Richard Davies*, Archdeacon of Brecon, and *Walter Lewis*, of Trevecca, in the said county of Brecon, minister of the Gospel, their executors or administrators, or the executors or administrators of the survivor of them, shall and may receive and take the rents, issues and profits of the above-mentioned estates, and pay the same to my son *James Jones*, for and during the term of his natural life; and from and immediately after his decease, then I give and devise the same, and every part thereof, to the heirs of the body of my said son *James Jones*, lawfully to be begotten; and in default of such issue, then I give and devise the same, and every part thereof, to my daughter *Catherine Jones*, and the heirs of her body lawfully to be begotten; and in default of such heirs, then I give and devise the same, and every part thereof, unto my son *James Jones*, his heirs and assigns, for ever."

The testator died in January 1826, Archdeacon *Davies* renounced the trusteeship, and *Walter Lewis* was also desirous of relinquishing the trust, but no power being contained in the will for the appointment of new trustees, a bill in Chancery was filed, upon which the lessors of the plaintiff, *Greatrex* and *Hoffman*, were appointed trustees of the will, and a proper conveyance of all the real estate devised by the will was made to them by *Walter Lewis*. It was objected at the trial, for the defendant, that no estate passed by the will to *Walter Lewis* and Archdeacon *Davies*. The learned Judge was of opinion that the legal estate did pass to them. A verdict was found for the lessor of the plaintiff, and leave was given to the defendant to

move to set the verdict aside and enter a nonsuit. In Michaelmas term 1835, *J. Evans* obtained a rule accordingly; against which,

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*Chilton* (and *E. V. Williams* was with him) now shewed cause. All that it is necessary to contend in this case is, that by the devise to the trustees to receive the rents and profits, and pay the same to *James Jones*, the trustees took some legal estate. The distinction is thoroughly established, that where the limitation is to trustees and their heirs, to receive the rents and profits and pay them over, they take a legal estate, but if the limitation is to trustees to permit and suffer another to receive the rents and profits, the legal estate is in *A*. It is true, that in *Doe v. Lessee of Leicester* (a), where the devise was to trustees to pay unto or permit and suffer his niece to have and take the rents and profits, it was held that the niece took the legal estate; but that decision proceeded entirely on the ground that the words "permit and suffer" occurred last in the will; and it was held, therefore, that they must prevail. But if there had only been the words "to pay the rents" to the niece, there can be no doubt the trustees would have taken the legal estate; *Garth v. Baldwin* (b), and the cases collected in 2 *Wms. Saund.* 11, n. 17 (c), are authorities in favour of the plaintiff.

*J. Evans* in support of the rule. Wherever it is necessary for the purpose of executing the trusts imposed on trustees by a testator, that they should have the legal estate, the Court will infer that it was the intention of the testator to devise it to them. But it is not necessary that the legal estate should be vested in the trustees in the present case. They are not trustees to preserve contingent remainders. They are merely to receive the rents and pay them to *James Jones*. There is undoubtedly a distinction between a devise to trustees to permit and suffer another to receive the rents of an estate, and a devise to trustees to receive the rents and pay

(a) 2 Taunt. 109.

(c) *Jeffreson v. Morton.*

(b) 2 Ves. 646.

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them over. But that is in the case of an express devise to the trustees. In this case the devise is only to the use and intent that the trustees should pay over the rents. There was nothing therefore to be done by them.

Lord DENMAN C. J.—As my brother *Patteson*'s attention has been called to this will, we will not decide this question without consulting him.

*Cur. adv. vult.*

Lord DENMAN C. J. now delivered the judgment of the Court.—It is enough to say, that on the argument of this case before my brother *Williams* and myself (*a*), we thought that it fell within the numerous class of cases where it has been held that a devise to trustees to pay over the rents vests the estate in such trustees. That the devise is not directly to the trustees, but “to the use and intent that they may receive, &c.,” appears to us to make no difference, nor does the absence of a devise to trustees to preserve contingent remainders. It was observed that the will required nothing to be done by the trustees; and it is true that nothing is to be done beyond paying; but this has been held sufficient, and must be taken to be the present law; (*Doe v. Lessee of Leicester* (*b*)). My brother *Patteson* was of this opinion on the trial, and on consideration retains it. The rule for a nonsuit must therefore be discharged.

Rule discharged.

(*a*) *Littledale* and *Coleridge* Js. were absent on account of severe indisposition. *Patteson*, J. was

sitting in the Bail Court.

(*b*) 2 Taunt. 109.

DOE d. REED v. HARRIS.

1837.

**EJECTMENT** for land in Glamorganshire. At the trial before *Patteson J.*, at the summer assizes at Cardiff, 1835, it appeared that the lessor of the plaintiff claimed as heir at law of one *John Reed*. The defendant claimed as devisee under his will. It was admitted that the lessor of the plaintiff was the heir at law. It was shewn also that *John Reed* had duly executed a will, which devised the property to *Alice Harris* the defendant. There were two objections made to the will at the trial.

First, that the will had been obtained by such importunities and duress as made it void.

Secondly, that the testator had revoked the same, by throwing it on the fire, from which it was snatched by the defendant, and preserved by her, contrary to the testator's desire.

The latter part of the case was proved by a witness, named *Esther Trehern*, who was not an eye-witness to the transaction, but deposed to declarations of both the testator and the defendant, and to a quarrel between them, arising out of it. From her testimony, it appeared that the will was thrown on the fire by the testator, and that the defendant, after a scuffle, had rescued it from the fire. She had afterwards, however, promised to destroy it, and had, subsequently, assured the testator that it was destroyed. The will was produced at the trial, and bore no marks of fire or other injury, except that the back sheet, which was blank, appeared, as the counsel for the plaintiff alleged, to have been removed, and re-attached to the rest of the will. *Esther Trehern* deposed to having seen the parcel containing the will, a little burnt at one of the corners. These circumstances, the counsel for the plaintiff contended, were sufficient to bring the case within the principle of the case of *Bibb v. Thomas* (a). The learned judge left the case, on both points, to the jury, and told them, that if they believed *Esther Trehern's* story, and that the testator threw the will upon the fire, with the intention of destroying it, and *Alice*

Friday,  
January 20th.

To cancel a will by burning, it is necessary that some part of the body of the will be burnt. A mere intent to burn, although the will is thrown by the testator upon the fire, is not sufficient.

(a) 2 W. Black. 1043.



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Harris had taken it off, and the testator then had insisted upon destroying it, and she had promised to burn it, but had not done so, that there was in law a revocation of the will. A verdict was found for the lessor of the plaintiff, the jury, when asked, declining to say on which ground they found it. In Michaelmas term, 1835, *John Evans* obtained a rule nisi to set aside the verdict, and for a new trial, on three grounds.

First, that there was no evidence of any such importunity or duress as would in law avoid the will.

Secondly, that there was in law no revocation of the will, even if all the facts relied on had been sufficiently proved.

Thirdly, that the fact of tearing, burning, or other similar act of revocation under the statute of frauds, could not be proved by any evidence of the kind tendered, but must appear on the instrument when produced, and be proved by an eye-witness.

Chilton and *W. M. James* now shewed cause against the rule, and were directed to confine themselves to the second point. In this case, all the facts were proved which were relied on in *Bibb v. Thomas* (a). There it was held, that the throwing a will on the fire by the testator, with a deliberate intent to consume it, though it falls off, and is preserved by a bystander, without his consent or knowledge, is a sufficient revocation.

In the statute of frauds (b), there is no allusion to the mode of proving the act of revocation. It was not intended to alter the rules of evidence, and therefore revocation may be proved by a declaration of the testator or the defendant, like any other fact. In the case of *Willis v. Newham* (c) it is true that it was held that a verbal acknowledgment of the part payment of a debt is not sufficient, within the statute 9 Geo. 4, c. 14, to take a case out of the statute of limitations. But that decision turned upon the peculiar words of that statute, and is inapplicable to the present case. It was held,

(a) 2 W. Black. 1043.

(c) 3 Y. & Jer. 518.

(b) 29 Car. 2, c. 23, s. 6.

in *Haydon v. Williams* (a), that a written promise to pay a debt barred by the statute of limitations, which had been lost, might be proved by parol evidence of the contents of the writing. [Lord *Denman* C. J. You need not trouble yourself with the point as to the mode of proof. The other point is the one which we wish to have argued. The objection to the mode of proof does not appear to have been taken at the trial.]

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The indorsement on the envelope of a will, which is usually thus, "the will of *A. B.*," forms part of the instrument, and the burning of the envelope is a sufficient revocation of the will. If there was a sheet of paper unwritten upon, attached to the will, surely the burning of that would be sufficient. In *Doe v. Perkes* (b), *Bibb v. Thomas* is recognized, and it is there laid down, that the question in these cases is, whether the testator has done all he intended to do, or whether the destruction has been prevented by any act of the testator's. Suppose, as in *Miss Blandy's* case (c), the testator had heaped the coals on the will, in order to consume it more quickly, and it had had a contrary effect, and the will had been thereby preserved, would not that be a revocation? If it be necessary that a portion of the writing should be burnt, how much must be consumed? Suppose a will, executed in duplicate, would not the burning of one part be a sufficient cancellation? In *Bibb v. Thomas* (d), the act was not complete. It was preserved by the fraud of the devisee. In that case the will was slightly singed; in this case the envelope bore the marks of fire. It can make no difference whether the envelope or the will bore the marks of fire. [*Patteson* J. You assume too much in saying that *Bibb v. Thomas* was determined on the burning of the will; it was also torn. It is impossible to say on which act of cancellation the Court determined that case.] It was distinctly decided on both grounds. It was held that there were two sufficient acts of revoca-

Second point.

(a) 4 M. & P. 811; 7 Bing. 163. the coals seem to have been put on
 (b) 3 B. & A. 489. accidentally.
 (c) 18 St. Tri. 1117. In her case (d) 2 W. Black. 1043.

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tion. The objection that the instrument bore no marks of fire would lead to this, that if the testator had obliterated the greater part of his will by throwing ink on it, which was afterwards removed by a chemical process, evidence of the obliteration would not be admissible. The general principle which, it is contended, was established by the case of *Bibb v. Thomas* (a) is, that if the testator have the intention of revoking his will, the slightest act showing that intention in any of the modes specified in the statute, is sufficient to operate as a revocation, although that act may be interrupted by the force or fraud of another person.

J. Evans and *E. V. Williams* were to have argued in support of the rule, but were stopped by the Court.

LORD DENMAN C. J.—On looking at the facts in this case, it is to be considered that a will is a most solemn instrument, and that the statute of frauds, after requiring it should be executed with certain solemnities, proceeds to lay down how it shall be revoked.

The statute requires that the revocation shall be made by one of certain acts, amongst others, by tearing or by burning the will. There is in this case no evidence to show that any one of the acts necessary for revocation has been done. It is impossible to say that the tearing or burning of the cover of the will is a tearing or burning of the will itself. Were we so to decide, we should carry the rule further than the statute intended. The statute has prescribed that certain visible acts should be performed. Cases, undoubtedly, may be put, where the burning or tearing may be slight. But the current of that reasoning runs against the argument of Mr. *Chilton*, because the object of the statute was to prevent refined questions of that nature. Two cases have been relied on in the course of the argument, *Bibb v. Thomas* (a), and *Doe v. Perkes* (b). In the former case, the testator had slightly burnt and had also torn his will. The Court said that two of the acts required by the statute were

(a) 2 W. Black. 1043.

(b) 3 B. & A. 489.

proved. If the question had been entirely new, probably we might have considered the question as doubtful. That case does not, however, show that an intent to burn or tear is sufficient. Then there is the case of *Doe v. Perkes*, in which the will was torn in four pieces by the testator, in order that it might be cancelled, in consequence of some offence given to the testator by the intended devisee, who was present when the will was torn. He apologised to the testator for the offence he had given him, and with that apology the testator was satisfied, and was contented that the will should not be destroyed. In that case, it was left to the jury to say whether the act of cancellation was complete, and the Court said, that that was the proper question to be left to the jury, and that the finding that the act of cancellation was incomplete was quite right. Neither of those cases is at all applicable to the present. We should be doing violence to the language of the statute, if we said there was any evidence to go to the jury of the cancellation of the will, and great inconvenience would arise if we were so to decide.

There is no inconvenience, if the rule is established that a party who really persists in revoking his will shall do it in the manner required by the statute, namely, that either the will shall be torn or burned, or obliterated, or an instrument of revocation executed, in the presence of three witnesses. We all agree in thinking, that what was done in the present case was not sufficient to revoke the will.

PATTESON J.—I am quite satisfied that I was wrong in my direction to the jury. When *Bibb v. Thomas* (a) was cited, I thought this fell within the rule laid down in that case. I did not see the distinction which has been pointed out by my lord. There was something in *Bibb v. Thomas* which the Court said was a tearing. It appears to have been given in evidence in that case, that the testator gave the will a rip and tore it. That shews there was a tearing of the document itself. The statute says that a will may

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be cancelled "by burning the same." Were we to hold that a tearing or burning of the cover was a cancellation, we should, in fact, decide that a strong intention to cancel was a cancellation within the meaning of the statute. I agree with my lord, that many inconveniences would arise from such a rule. There is no evidence in this case of any actual or partial burning of the will itself; and, in my opinion, the statute requires that there should, at least, be a partial burning of the document itself; that is, of the paper on which the will is written.

WILLIAMS J.—We ought, in my opinion, to adhere to the words of the statute. Into what difficulties would the Court be thrown by departing from the plain meaning of the words. The cases put in the course of the argument afford illustrations of the difficulties in which the Court would be involved by adopting such a course. The language of the statute is, that a revocation may be made by burning the will. That has not been done in this case. How much of the will has been torn or burnt is immaterial, but it is necessary that some part should be burnt.

COLERIDGE J.—If we were to adopt the argument which has been urged to-day, we should be laying the foundation, step by step, for a repeal of the statute of frauds. The statute says, that there shall be a revocation, not where the intention is strongly evinced, but where a certain definite act has been done. The statute requires that there shall be a signature to a will, and that that signature shall be attested by three witnesses. No explanation is permitted why a signature is wanting, or why the required number of witnesses was not present. It is the same with respect to the revocation of a will. There must be some act done, coupled with an intention to revoke. We were pressed with the argument, must the whole of the document be destroyed? I say no, but there must be a destruction of so much as to impair the entirety of the will, so that it may be said the will does not exist in the manner framed by the

testator. In this case, the fire does not touch the will. All that can be urged is, that the destruction was prevented by the fraud of the devisee. Suppose a testator had intended to revoke his will, and was about to sign an instrument of revocation, but was prevented by a third party, could that be said to be a revocation? Good sense requires we should take the plain words of the statute.

Rule absolute.

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HAYWARD v. HASWELL.

Tuesday,
January 24th.

THIS was a special case for the opinion of the Court. The action was in replevin. Avowry, that the plaintiff, for the space of two years from the 26th March, 1835, was tenant to the defendant at a certain rent, and that the rent was in arrear. The plea traversed the tenancy. At the trial before Lord Denman C. J. at Guildhall, on the 15th December, 1835, the defendant gave in evidence the following instrument in writing, signed by both parties :—

An instrument cannot operate as a lease, if it appear on the face of it that the supposed lessor has not the power, at the time of executing the agreement, to grant a lease.

“ Articles of agreement made and concluded the 21st day of May, 1833, between *C. P. Haswell*, of &c. for himself, his heirs, executors, and administrators, of the one part, and *Catherine Hayward*, of &c. for herself, her heirs, executors, and administrators, of the other part, as follows :— that is to say, the said *C. P. H.* in consideration of the agreements hereinafter contained on the part of the said *C. H.*, her executors or administrators, hereby agrees to grant, at the time hereinafter mentioned, unto the said *C. H.*, her executors, administrators, or assigns, a lease of all that piece or parcel of land, &c. And also of the dwelling-house, workshops, erections, and buildings hereinafter agreed to be erected and built on the scite thereof, with their and every of their rights, members, and appurtenances, situate, lying, and being on the north side of Tenter Street, Little Moorfields, in the City of London, as the same now are and have been for many years past in the possession of the said *C. H.* for the term of fifty-nine years and one quarter of another year, wanting ten days, from the 25th day of March last, at the rent of 12*l.* 10*s.* for the first half year of the said term, payable in equal portions on the 24th day of June and the 29th day of September next; and at the yearly rent of 60*l.* for the remainder of the said term, payable quarterly on the 25th day of December, the 25th day of March, the 24th day of June, and

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the 29th day of September, by equal portions, free from all deductions whatsoever, whether on account of taxes or otherwise howsoever. And for the consideration aforesaid the said C. P. H. further agrees to and with the said C. H., her executors, administrators, and assigns, that he the said C. P. H. shall and will, within the space of four calendar months from the date hereof, at his own proper costs and charges, under the inspection, and to the approbation and satisfaction of the surveyors for the time being of the Merchant Tailors' Company, erect, build, and finish fit for habitation, in a good, sound, substantial, and workmanlike manner, on the before-mentioned piece of ground, a dwelling-house and workshop, in the manner described in and according to the specification and plans hereunto respectively annexed; he being allowed to remove and convert to his own use, or in and about the erections and buildings, so much and such part only of the said brick frontage and old materials appertaining thereto as belong to the premises formerly in possession of one ——— *Fenwick*. And the said C. H., in consideration of the costs and charges to be incurred by the said C. P. H. in and about the performance of the several works specified and described in the said specification and plans, hereby agrees that she the said C. H., her executors, administrators, or assigns, shall and will accept and take the said lease, and execute a counterpart when tendered to her or them for that purpose. And also that she the said C. H., her executors, administrators, or assigns, shall and will, within the like period of four months, at her or their own costs and charges, erect, build, and finish on the said piece of ground all such other erections and buildings in addition to those hereinbefore agreed to be erected and built by the said C. P. H., as are required to be erected and built under and by virtue of certain articles of agreement bearing date the 5th day of October last, and made between the Merchant Tailors' Company of the first part, the venerable *Joseph Holden Pott*, Archdeacon of London and Prebendary of the Prebend of the Moors, founded in the Cathedral Church of St. Paul, London, of the second part, and the said C. P. H. of the third part; and in conformity therewith, and that the erections to be so respectively erected and built by the said C. P. H. and C. H., when finished shall be of the aggregate value of 800*l*. And it is hereby agreed and declared by and between the parties hereto to be the true intent and meaning of them and of these presents, that the lease hereby agreed to be granted shall be granted immediately after the said C. P. H. shall obtain his lease of the said premises, under the before-mentioned agreement of the 5th day of October last, and which he shall obtain with all convenient speed at his own costs and charges, and shall contain, on the part of the lessee, like covenants, provisoes, and agreements to those to be contained in the original lease of the said premises so to be granted to the said C. P. H. as aforesaid, and such other covenants as are usual and common in like leases. And that the said C. H., her executors, administrators, or assigns, shall and will well and truly pay the rent hereby agreed to be paid, on the days and in the manner aforesaid, as if the lease hereby agreed to be granted had been executed, and

perform and keep all and every the stipulations to which the said *C. P. H.* is subject to by the agreement under which he holds the said premises, except such as he is bound to perform by virtue or in pursuance of these presents, and from time to time indemnify and keep indemnified him the said *C. P. H.*, his executors, administrators, and assigns, of, from, and against all loss, damage, or expense which he or they may incur or sustain by reason of the non-performance thereof. And it is also agreed by and between the parties hereto, that the said *C. H.*, her executors, administrators, or assigns, shall and will pay or reimburse the said *C. P. H.*, his executors, administrators, or assigns, the amount of the costs and charges for preparing these presents and also of the following instruments; videlicet, the agreement and counterpart between the said Company and the said *C. P. H.*, the lease and counterpart to be executed by him unto the said *C. H.*, her executors, administrators, or assigns, by virtue of these presents, which latter is to be prepared by the solicitor to the said *C. P. H.* Provided always, that if it should happen that the said *C. H.*, her executors, administrators, or assigns, shall neglect to pay the before-mentioned rent on the days and in the manner hereinbefore provided, or shall neglect to perform, fulfil, and keep all and every the stipulations and agreements hereinbefore contained, and on her part to be performed, fulfilled, and kept, according to the true intent and meaning of these presents, then and in either of those cases this agreement, so far as relates to the engagements of the said *C. P. H.*, his executors, administrators, or assigns, shall be void and of no effect; and he or they shall immediately thereupon be at full liberty to retain or enter upon possession of the premises hereby agreed to be let and relet, or otherwise dispose of the same to the exclusion of the said *C. H.*, her executors, administrators, and assigns, any thing hereinbefore contained to the contrary in anywise notwithstanding. And the said *C. P. H.* doth hereby further agree to and with the said *C. H.*, her executors, administrators, and assigns, that in case the said *C. P. H.*, his executors, administrators, or assigns, shall neglect to perform, fulfil, and keep all and every the stipulations and agreements hereinbefore contained, and on his part to be performed and kept, then that he the said *C. P. H.*, his executors, administrators, or assigns, shall and will upon demand pay unto the said *C. H.*, her executors, administrators, or assigns, the sum of 500*l.* as and for liquidated damages. In witness, &c."

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A verdict was found for the plaintiff, and leave was given to the defendant to move to set that verdict aside and enter a verdict for himself. The value of the goods and of the rent in arrear, was agreed upon. The question for the consideration of the Court is, whether the above instrument was an agreement for a lease, or a lease.

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First point:
Terms of tenancy not ascertained.Second point:
No power in the lessor to grant a lease.

R. Gurney, for the plaintiff. This was an agreement for a lease, and not a lease; there was no certainty in the agreement as to the terms on which the plaintiff was to hold, and the covenants she was to perform; *Morgan v. Bissell* (a), and *Doe v. Ries* (b), shew that if the terms of the intended tenancy are not completely ascertained, the instrument will operate as an agreement only.

Secondly, it is clear from the agreement itself, that the defendant had not, at the time the agreement was executed, power or authority to grant a lease. If that be so, according to *Reynart v. Porter* (c), and *Doe v. Clare* (d), the instrument cannot be considered as a lease. For this reason the present case is distinguishable from *Pinero v. Judson* (e). The defendant may recover for use and occupation, and yet have no power of distress, *Hope v. Booth* (f). Besides, in this case, part of the buildings have to be erected, which shews that the parties did not intend that this should be a lease; *Roe v. Ashburner* (g). In addition, there is the clause at the conclusion with respect to liquidated damages; from which it is manifest that the parties thought of and intended only to enter into an agreement, not an actual lease.

First point.

Godson contra. This case must be considered as to the occupation by the tenant, as to the power of defendant to demise the premises, and as to the intention of the parties. It was evidently the intention of the parties that this should be considered as a lease. There are words of present demise. The period when the term is to commence is fixed, and that is from a past day, and the lessee is in pos-

(a) 3 Taunt. 65.

(e) 3 M. & P. 497; S. C. 6

(b) 1 M. & Scott, 259; S. C. Bing. 206.

8 Bing. 178.

(f) 1 B. & Ad. 498.

(c) 5 M. & P. 370.

(g) 5 T. R. 163.

(d) 2 T. R. 739.

session; *Pinero v. Judson* (a) goes the full length of this case. There, the agreement was for a lease, and there was a stipulation for the lessee to commence with laying out a considerable sum on the premises; the lease was to contain certain specified covenants, and there was the following clause;—"and in the meantime and until the lease should be executed, to pay and to hold the same premises subject to the covenants above mentioned." It was held that this was an actual demise, and not an agreement for a lease. That case clearly shows, that although the instrument states that a lease is to be subsequently prepared, yet it will not be considered as an agreement from that circumstance only. In *Poole v. Bentley* (b) the instrument contained the expression, "the lessor agrees to grant" a lease, and it was to be considered binding till a lease could be fully prepared, yet that instrument was held to be a demise. In *Doe v. Ries* (c) the agreement referred to a future lease, but still it was held to be a demise. In *Morgan v. Bissell* (d) the amount of rent was not fixed. Here it is ascertained. If there is any uncertainty with respect to the rent, no doubt the instrument will operate as an agreement only.

In *Warman v. Faithful* (f) it was held, that a memorandum of an agreement to let which contains words of present demise, and sufficiently ascertains the terms of the intended tenancy, will operate as a present demise, although it provides for the preparation of a future lease.

In *Doe v. Clare* (e) there was a covenant that the supposed lessor should procure a licence to demise the premises, which were copyhold, and therefore required the leave of the lord. In this case there is no doubt that the party had a right to demise. Second point.

R. Gurney, in reply, was stopped by the Court.

(a) 3 M. & P. 497; S. C. 6
Bing. 206.

(b) 12 East, 168.

(c) 1 M. & Scott, 259; S. C. 8
Bing. 178.

(d) 3 Taunt. 65.

(e) 2 T. R. 739.

(f) 3 N. & M. 137; S. C. 5 B.

& Ad. 1042.

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Lord DENMAN C. J.—It is impossible to say that this instrument is a lease, when it appears on the face of it that the party had not, at the time the agreement was executed, power to grant a lease.

WILLIAMS, J. and COLERIDGE, J. concurred.

Judgment for the plaintiff (a).

(a) See the cases collected in *Staniforth v. Fox*, 7 Bing. 590.

Tuesday,
Jan. 24th.

AYLING and Wife v. WHICHER.

A declaration in trover, brought by husband and wife, dated 1836, stated, that before the marriage of the plaintiffs, by an indenture made between L. of the one part, and the wife of the other part, L. assigned unto the wife certain household furniture, mentioned in an inventory annexed to the indenture, as her own property, provided that in case the said L. should pay the wife 95*l.* on the 29th October, 1837, or on such earlier day as the wife should appoint by

TROVER. The declaration was dated 11th January, 1836, and stated:—For that whereas heretofore, and before the time of committing of the grievance by the defendant, as hereinafter mentioned, and before the marriage of the said plaintiffs, to wit, on &c., by a certain indenture then made between G. L. of the one part, and the said plaintiff *Mary Ann Ayling*, (then *Mary Ann L.*) of the other part: It was witnessed, that the said G. L. did bargain, sell, and assign unto the said plaintiff *Mary Ann Ayling*, (then being *Mary Ann L.*) all and every the household goods, furniture, fixtures, plate, linen, and china, stock in trade, utensils, implements, and things, which were then in, about, and belonging to the public house, called or known by the sign of the Ship, outhouses and estate of the said G. L., situate and being in Tower Street, in the parish of Subdeanery, in the city of Chichester, in the county of Sussex, then in his occupation, and which were particularly mentioned, enumerated, and described in a certain inventory thereof to the said indenture annexed, and all the right, &c. of the said G. L., in and to the said goods, chattels, and premises, and every part and parcel thereof, to have, take, receive, and enjoy the said goods chattels, and prewriting, and should in the meantime, until the repayment of the principal, pay interest thereon, the indenture should be void. The declaration then stated, that the plaintiffs had not obtained possession of the furniture, and that the said plaintiffs were on, &c. lawfully possessed of the inventory, and being so possessed lost it. The declaration then stated a finding of the inventory and conversion by the defendant. To this there was a demurrer, because the wife was joined. It was held, that the husband might either sue separately or join his wife.

mises, thereby assigned, or expressed or intended so to be, unto the said *Mary Ann Ayling*, (then *Mary Ann L.*) her executors, administrators, and assigns, as her and their own property and effects; provided nevertheless, and it was thereby declared and agreed by and between the said parties to the said indenture, that in case the said *G. L.*, his executors or administrators, should and did well and truly pay or cause to be paid unto the said *Mary Ann Ayling*, (then *Mary Ann L.*) her executors, administrators, and assigns, the sum of 95*l.*, on the 29th day of October, which would be in the year of our Lord 1837, or at any such earlier day or time as the said *Mary Ann Ayling*, (then *Mary Ann L.*) her executors, administrators, or assigns, should appoint for the payment thereof, in and by a notice in writing to be given to the said *G. L.*, his executors or administrators, or left at his or their last or usual place of abode, at least three calendar months before the day or time so to be appointed for payment as aforesaid; and did and should in the meantime, until the repayment of the said principal sum of 95*l.* at either of the periods aforesaid, well and truly pay or cause to be paid unto the said *Mary Ann Ayling*, (then *Mary Ann L.*) her executors, administrators, or assigns, interest thereon, at the rate of 5*l.* per cent. per annum, by equal quarterly payments, on &c., and such several payments aforesaid to be made without any deduction or abatement whatsoever, then and in such case the said indenture, and every article, clause, and thing therein contained, should cease and determine, and be absolutely void; and that the said plaintiffs had not, nor had either of them as yet received or obtained possession of the said household goods, furniture, &c.; and that the said plaintiffs heretofore, to wit, on &c., were lawfully possessed, as of their own property, of the said indenture, and of the said inventory, the said inventory then being of great value, to wit, of the value of 100*l.* of lawful money of Great Britain; and being so possessed thereof as aforesaid, the said plaintiffs aforesaid, to wit, on &c., casually lost the

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said inventory out of their possession; and the same afterwards, to wit, on &c., came to the possession of the said defendant by finding: Yet the said defendant, well knowing &c., converted and disposed of the said inventory to his own use.

Demurrer. The causes of demurrer were stated to be as follows:—That the said declaration states that the said plaintiffs were possessed of the said inventory, before the said inventory was in any manner received by the said defendant; and therefore the inventory was the property of the said plaintiff, *Henry Ayling*; and that the said *Mary Ann*, his wife, ought not to join in an action for the recovery of the said inventory, after it had so become the property of the said plaintiff, *Henry Ayling*; and that it is not averred in the said declaration that the said defendant in any manner received the said inventory before the intermarriage of the said plaintiffs.

Joinder in demurrer.

The following was the point stated for argument in the margin of the paper-book.

The defendant will contend, that the plaintiff, *Mary Ann Ayling*, ought not to join in the action, as the declaration states that the plaintiffs were possessed of the inventory, which is the subject of the action, before the same was received by the defendant, and that it was, therefore, the property of the said *Henry Ayling* only.

Gale, in support of the demurrer. The wife is improperly joined. The declaration alleges, that the husband and the wife were possessed of the indenture and of the inventory; that they casually lost the inventory, and the defendant found and converted it to his own use. The general rule is laid down in the notes to 2 *Wms. Saunders*(a), that the husband and wife cannot have an action of trover, and declare that they were both possessed of certain goods,

(a) Note 47 i, to *Wilbraham v. Snow*.

and that the defendant converted them to their damage; for the possession of the wife is the possession of the husband, and so is the property, and therefore the conversion cannot be to the damage of the wife, but of the husband. It may perhaps be contended for the plaintiff, that the goods belonged to the wife before marriage, and that the inventory was incident to the goods. One personal chattel cannot, however, be incident to another chattel. But assuming that may be so, still if this action had been brought for the goods themselves, the wife could not be joined. Where there is a chose in action, which would survive to the wife, or where the wife is the meritorious cause of action; or where the action is for an injury to the real property of the wife, there she may be joined. But the property of the goods and the inventory in this case vested in the husband, and he alone ought to bring the action. *Com. Dig.* Baron & Feme, (E 3); *Wildman v. Wildman* (a). It is not necessary, with respect to personal chattels, that the husband should have done an act to vest them in possession.

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Peacock contra. It is not necessary to shew that the husband could not have sued alone. There are many cases in which the husband may sue alone, or join with his wife, at his election. *Comyns' Dig.* Baron & Feme (X). In general a husband must sue alone for a conversion of goods of his wife, which have come to his actual possession, and been lost after coverture. But in this case the property comprised in the deed, and specified in the schedule, not having been reduced into possession, was a mere chose in action, which would have survived to the wife if she had outlived her husband, before it had been reduced into possession; *Purdew v. Jackson* (b), *Milner v. Mills* (c); *Co. Litt.* 351 a.

If so, the right to the schedule, which is part of the title to the goods, would also survive to the wife, and not go to

(a) 9 Ves. jun. 174.

(b) 1 Russ. 1.

(c) 3 T. R. 627.

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the executors of the husband. With respect to real property, it is clear that the right to the title-deeds follows the right to the property. *Comyns' Dig. Charters*, (A & B). And although there are no cases to be found expressly deciding that the same rule applies to personal property, still upon principle the cases are alike; and it would be an anomaly if the goods should survive to the wife, and the deed, which is the evidence of the title to the goods; should go to the executors of the husband. Suppose the case of a bond given to the wife *dum sola*. If the husband should actually have the bond in his possession after coverture, but should die before he recovered the debt, the debt would survive to the wife. *Comyns' Dig. Baron & Feme* (Z). Yet upon the principle contended for by the other side, the bond itself having been in the husband's actual possession, would go to the husband's executors, who might destroy it or do what they pleased with it, and thus deprive the wife of all means of recovering the debt. If the inventory would survive to the wife, this action would also survive to her; and wherever the action would survive to the wife, she may join with her husband; *Roll. Abr.* 348, T.; *Comyns' Dig. Baron & Feme*, (V & W).

The reason is, that the action may not abate by the death of the husband. In an action for trover before marriage, and conversion after, the husband and wife may join, for trover disaffirms the property. But the husband should sue alone in detinue, which affirms the property; *Powes et ux. v. Marshall* (a). The same point was decided in *Blackburn et ux. v. Greaves* (b). Detinue lies by husband and wife, for a deed by which an annuity is granted to the wife; *Bac. Abridgement*, tit. Detinue B.; *Roll. Abr.* 606.

So trover lies by husband and wife for a deed of rent-charge granted to the wife *dum sola*, though the deed is lost after coverture; *Comyns' Dig. Baron & Feme* (V). But even if the inventory would not survive to the wife,

(a) Sid. 172.

(b) 2 Lev. 107.

the conversion of it would prejudice the remedy by the husband and wife, for the recovery of the goods; and husband and wife may join in an action for a tort, during coverture, which prejudices a remedy by them; *Comyns' Dig.* ubi sup., *Fenner v. Plasket* (a). If the inventory were lost, and the wife survived the husband, before the goods were reduced into possession, she would be deprived of the evidence of her title. The conversion, therefore, is a tort, for which she may be joined as a co-plaintiff; 1 *Roll. Abr.* 348, c. 18. So she may join, when she is the meritorious cause of action; *Comyns' Dig.* Bar. & Feme, (X).

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Gale, in reply. No authority has been cited to shew that one personal chattel may be incident to another. *Martindale v. Booth* (b) shews that property draws to it the possession of the goods, otherwise trespass could not have been maintained in that action. The principle is clearly laid down, that if the husband and wife are jointly possessed of chattels, for the wrongful conversion of them the husband must sue alone; *Bacon's Abridgment*, Detinue A. All the cases cited have been either of injury to real property, or of matter which would survive to the wife. [Lord *Denman* C. J. Here the day for the payment of the principal has not arrived.] The property vests notwithstanding. The day had not arrived in *Martindale v. Booth* (b), and yet an action of trespass was permitted to be maintained, to support which action possession is necessary.

LORD DENMAN C. J.—It appears to me this is one of the cases in which the husband may either sue alone, or the husband and wife may join. I cannot say that these goods have been reduced into possession by the husband at a time when it is quite possible the interest may have been paid, and the principal repaid, so that the goods may

(a) Cro. Eliz. 459.

(b) 3 B. & Ad. 498.

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never become the property of either the husband or wife. The husband undoubtedly might sue for the inventory separately, because he is prevented, by the non-possession of it, from reducing the goods into possession; but at the same time, if the wife's interest continues in such a manner that in the event of the husband's death it would survive to her, and in case of her death it would go to her executor, although the husband may sue alone, yet he does not do wrong in joining the wife. That appears to me to be the principle that must be applied to all these cases, and it must be taken to apply equally to the deed, by which the possession of the goods may be obtained or defended, as to the goods themselves. This action is therefore properly brought.

WILLIAMS J. concurred.

COLERIDGE J.—The true test whether in this case the wife is properly joined, is, not whether the husband might have sued alone, but whether there is such a continuing interest in the wife, that, under any state of things after the husband's death, she would have a right of action. I think, on the particular circumstances of the case, that must be answered in the affirmative. This transaction appears to be a mortgage of chattels. It is stated on the face of the deed, that on five per cent. interest being paid, and the principal being repaid, and on certain notice being given, the deed should be void. On the face of the deed, therefore, it appears that during the payment of the interest, the goods are not to pass into the hands of the mortgagee. Then the declaration states, the husband and wife have never in point of fact received or obtained possession of the goods.

I do not say in all cases it is absolutely necessary, with regard to a personal chattel, that the husband should reduce it into actual possession, to acquire the sole property in it. I desire not to be supposed to lay down any such rule, but under the circumstances of this case, I think this deed

seems to contemplate that the property in the goods should only pass under certain circumstances; that state of circumstances may continue during the whole of the coverture; and if it should so continue, it does not appear to me clear that the wife would not have the right to the goods after the husband's death, and not the husband's executors. I think, therefore, the wife is well joined.

Judgment for the plaintiff.

THE KING v. THE INHABITANTS OF WITHERNWICK.

AN appeal against an order for the removal of *William Tiplady*, *Ann* his wife, and their four children, from the township of Withernewick, in the East Riding of the county of York, to the township of West Newton in the said riding and county. The Court of Quarter Sessions confirmed the order, as to *William Tiplady* and *Ann* his wife, but quashed it as to the four children, subject to the following case.

The order of removal did not state the names or ages of the children, but it stated that West Newton was the place of their last legal settlement.

The township of West Newton appealed against this order, at the quarter sessions holden at Beverley, in and for the said riding, on the 13th day of April following, and in their notice of appeal, signed by two overseers of the poor, assigned as their only causes of appeal that the said pauper, *William Tiplady*, never obtained a settlement at West Newton aforesaid, by hiring and service, as alleged in the examination of the case annexed to the said order of removal; and if he did obtain such settlement, then, that subsequently thereto, namely, about thirteen years ago, being then unmarried, he the said *William Tiplady* gained a settlement by hiring and service for one whole year with one *William Smith*, then of the parish of Leven, in the said East Riding

omission of the statement of both the names and the age is such a defect have the power to permit to be amended.

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Although an order of removal contains on the face of it defects, either of form or substance, those defects cannot be taken advantage of on appeal, unless the notice of the grounds of appeal states them.

An order of removal for removing a father and his children, which omits to state either the names or ages of the children, is not necessarily void, as the children may neither have been baptized or acquired a name by reputation: per *Coleridge J.*
Quere,

Whether the
as the sessions

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of the county of York, farmer. Upon the trial of the appeal, it was proved that the said *William Tiplady* gained a settlement in the said township of West Newton, by hiring and service; that he had only four children, and that such children were legitimate, and were named *Maria*, *William*, *David*, and *Ralph*, and were of the respective ages of ten, seven, six, and two years, or thereabouts. The appellants failed in proving any subsequent settlement in the parish of Leven, or elsewhere. But at the trial of the said appeal, the appellants objected that the said order of removal was bad as respected the children of the said *William Tiplady*, inasmuch as it did not state the names or ages of such children; and the respondents, on the other hand, argued that it was not necessary to state the names or ages of the children, inasmuch as the order of removal adjudged that the said township of West Newton was the legal settlement of the said *William Tiplady*, *Ann* his wife, and their four children; and besides, that the appellants could not make this a matter of objection, inasmuch as they did not set it out, or specify the same in their notice, as one of the grounds of their appeal, and that, at all events, the Court of Quarter Sessions had the power to amend the order of removal, by inserting the names and ages of the children in it. The Court of Quarter Sessions thereupon confirmed the order of removal, as to the said *William Tiplady* and *Ann* his wife, but quashed it as to the four children, subject to the opinion of this Court, whether the fact of the children not being named, and their ages not being stated in the order of removal, was, under the circumstances, a legal objection to such order; and whether the appellants could, by law, insist on such objection (if it were one), the same not being stated as one of the appellants' grounds of appeal, in their notice of appeal, and whether the Court of Quarter Sessions had the power to amend the order of removal, by inserting the names and ages of the children in such order. If this Court should be of opinion that the appellants were precluded from making this objection, or that, under the circumstances, it was not any legal objection, then the original order of remo-

val shall be altogether confirmed; or if this Court should be of opinion that the Court of Quarter Sessions had the power to amend the original order of removal, then such order shall be amended accordingly, and shall be then confirmed. But if, on the contrary, this Court should be of opinion that the objection was a valid one, and that the appellants might make such objection, although they did not state it in their notice as one of the grounds of their appeal, and that the Court of Quarter Sessions had no power to amend the original order in manner above mentioned, then the order of sessions shall stand confirmed.

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R. Hildyard in support of the order of sessions. It is not required by the Poor Law Amendment Act (a) to state, in the notice of appeal, any defect apparent on the face of the order itself. It is competent to every Court, out of regard to the regularity of its own proceedings, to quash an order brought before it which is defective on the face of it. Suppose it had appeared, by the caption of the order of removal, that the respondent parish was in one jurisdiction, and the removing justices in another, the order would then be a nullity, and it would be competent to the parish to which the pauper was removed, either to remove the order by *certiorari* into this Court, and have it quashed, or not to appeal against it, and treat it as a nullity. Would this Court, in such a case, or where the order was brought before the Court of Quarter Sessions on appeal, require them to blink the objection apparent on the face of their own records?

First point :
Not necessary
to state, in a
notice of ap-
peal, objec-
tions apparent
on the face of
the order of
removal.

At the sessions, *Rex v. Bromyard* (b) was cited, in which the decision was, that on the hearing of an appeal against a poor rate, the sessions have no jurisdiction to quash the rate for a defect apparent on the face of the rate itself, unless that defect be specified in the notice as a cause of appeal. There is some slight difference between the language of the act (c), which requires notice of the ground

(a) 4 & 5 Will. 4, c. 76.

& C. 240.

(b) 2 M. & R. 280; S. C. 8 B.

(c) 41 Geo. 3, c. 23.

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of appeal against a poor rate, and the Poor Law Amendment Act. The former speaks of causes or grounds of appeal. The latter of grounds of appeal. It is to be presumed that the legislature made use of this difference in language with some object. The main distinction, however, between *Rex v. Bromyard* (a) and this case is, that in that case the rate was voidable; here the order is void. [Coleridge J. Does not your argument assume this, that you may take all objections at the sessions which you could if the order was removed into this Court by *certiorari*?] Not entirely. Only such objections can be taken as make the order a mere nullity. [Coleridge J. Considerable hardship would be inflicted on the respondents if the appellants are permitted to go into objections which are not stated as the grounds of appeal. If they had been so stated, possibly the respondents might have abandoned the order.] The object of the section of the Poor Law Amendment Act was, that the respondents might know on what *facts* the appellants rely. The order of removal is in the possession of the respondents. Every one is supposed to know the law. It is, therefore, to be presumed that they were aware of defects apparent on the face of the order, and it cannot be said that they are taken by surprise.

Second point:
The order void
as to the chil-
dren, as nei-
ther their
names nor
ages were
stated.

The defect is such as renders the order a nullity. Neither the names or ages of the children are stated. If it had contained the names, the adjudication would have removed all doubt. An order is a judgment, and must be certain and positive. In *Nolan's Poor Laws* (b), it is said, "If an order be made for removing a man, his wife, and children, and the adjudication respects only the father's settlement, the children's ages should be set forth, or the order will be bad as to them; and if it appear that the child is above seven years old, then it must adjudge that the child has not gained a settlement in its own right. But if it expressly adjudges the place to which they are removed to be the last legal settlement of the children, it need not specify

(a) 2 M. & R. 280; S. C. 8 B. & C. 241.

(b) Vol. ii 223.

their ages." It is of great importance that the ages of the children should be stated, as the order of removal may be acted on at a great distance of time, when it may be impossible to procure evidence upon the subject.

The sessions had no power to amend. The power to amend matters of form is given by the 5 Geo. 2, c. 19, and that statute has always been construed strictly. If the defect is such that the order, if unappealed against, is a mere nullity, then the defect is matter of substance, and not of form.

When a record is before this Court, it is bound to see whether the proceedings are valid. If there be a fatal defect in the order, this Court will now quash it. The points which may be taken in argument relative to orders removed into the Court of King's Bench are enumerated by Mr. Nolan (a); "1st. Such as originate in objections to the certiorari. 2ndly. In defects arising upon the face of the orders removed by it. 3dly. Upon the law as it arises from the facts stated in the case." Therefore, whether the sessions could take cognizance of this defect or not, this Court is bound to do so.

N. Clarke, (and Archbold was with him), was stopped by the Court.

LORD DENMAN C. J.—We think we ought not to introduce any distinction which may prevent the application of the clear words of the statute to a point of practice. It is unnecessary for us to inquire whether this is matter of form or substance, and amendable or not, because we are clearly of opinion the sessions were not warranted in going into that objection.

WILLIAMS J.—I am of the same opinion. I do not find that it has been decided that the 81st section, which requires the grounds of appeal to be stated, is to be confined to grounds of appeal on which evidence is to be given. We are left unfettered as to the construction of the act of parliament, which seems to me to require a large and ample

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Third point:
The sessions
no power to
amend.

Fourth point:
The order of
removal being
void, this
Court will
now quash it.

First point.

First point.

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construction. The act declares that the parties shall not go into any matters of appeal, other than those set forth in the notice of appeal. As this was not made the subject-matter of notice, it seems to me that the parties cannot, under this act of parliament, go into the objection.

First point.

COLERIDGE J.—I am quite of the same opinion. It has been a very common ground of complaint, that this Court, by the allowing of refinement in the construction of statutes relating to the poor, have occasioned a great deal of litigation. We are now dealing with a new act of parliament, which is most plainly expressed, and I think, therefore, we are bound to give the plain and literal interpretation to the words of this statute. They are as plain as possible, that an appellant, on the hearing of an appeal, shall not be allowed to go into or give evidence as to any other grounds of appeal against an order of removal, than those set forth in his statement.

Fourth point.

It is said that the statute does not apply to defects on the face of the order. I do not know why it does not. It is argued that a party who is in possession of the order is bound to know the law, and bound to know the defects in the order. So he may be, but he may also be led to suppose the other party does not intend to rely on such defects, and therefore he proceeds to maintain his order, and goes to the sessions, because he is only to contend with the objections which the other parties make in their statement of the grounds of appeal.

Then Mr. *Hildyard* says, lastly, when this order is brought before the Court, that we are bound to take notice of the defects apparent on the face of the order, and to quash it. For the present, I will concede that such is the duty of this Court; but it appears to me, that this is not a defect necessarily apparent on the face of the order. It is properly a ground of appeal, because, in order to raise it, some evidence must be adduced. If this order came here in the present state in which it is, we must exclude, on this point, all considerations of the facts stated. We must look only to the face of the order.

I am not prepared to say an order is necessarily bad on the face of it, because neither the name nor age of the child is stated, for neither may be known, and therefore, in order to let in that defect, some evidence must be shewn, that there were means of ascertaining either the name or the age. There might very well be an illegitimate child, who had never acquired any name by reputation. So these children, for any thing we know, may never have been christened. They may have no name, and may have attained no name by reputation. We are at liberty to make all those surmises, because Mr. *Hildyard's* argument drives him to contend that the order on the face of it is necessarily bad; and that no state of things can be supposed in which such an order can be good. To that extent I am not prepared to go. It appears to me therefore this order must be quashed.

Order of Sessions quashed.

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WICK.

Second point.

The KING v. The Inhabitants of SNAPE, in Suffolk.

Wednesday,
January 25th.

UPON appeal against an order of two justices, whereby *Abigail*, widow of *William Alexander*, was removed from the parish of St. Osyth, in the county of Essex, to the parish of Snape, in the county of Suffolk, the sessions confirmed the order, subject to the opinion of this Court on the following case.

In 1817 *William Alexander*, then a servant in the employ of *William Kendall Dawson*, was engaged by him to take care of his stock upon the marshes of St. Osyth. It was agreed that he should receive 12s. a week wages, the keep of one cow, of four sheep, and of two pigs, upon the marshes, and for this he was to occupy, rent free, a certain house situate upon the marshes. This house had been originally built for and had always been appropriated to the use of the person who looked after the stock upon the marshes, and was never let to any other person, and *Dawson* hired the marshes and the cottage at the same time. *Alexander*

Where the question on appeal respecting the settlement of a pauper is, whether he occupied a tenement in the character of a servant, and the sessions find he occupied as a servant, and state the facts for the consideration of the Court of King's Bench, the finding will not be set aside, unless it appears necessarily wrong.

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was to go into the house at Michaelmas, and at the time he commenced to take care of the stock on the marshes it was stipulated, at his express desire, that he should not be obliged to leave the house unless he had notice to quit at Michaelmas.

Alexander took charge of the stock and possession of the cottage in 1817, and resided in it for more than nine years, during which time he had no other employment than taking care of Mr. *Dawson's* stock. The sessions found, that the keep of a cow, four sheep, and two pigs, given to *Alexander* under the above agreement, was not exclusive of the cottage, a tenement of sufficient value to confer a settlement; and also were of opinion, upon the facts above stated, that the occupation of the cottage by the pauper was an occupation by him in the character of a servant, and connected with the hiring, and not an occupation as a tenant. If the Court be of opinion the sessions arrived at an improper decision with respect to the cottage, the order of sessions is to be quashed, otherwise it is to stand confirmed.

Ryland, in support of the order of sessions, was stopped by the Court.

Knox contra. This was a coming to settle within the meaning of 13 & 14 Car. 2, c. 12. The agreement related not only to the rate of wages but to the renting of the house. There was evidently great anxiety on the part of the pauper that he should occupy as a tenant, since he stipulated that he should not be obliged to leave the house unless he had notice to quit at Michaelmas, which means a six months' notice. [Lord *Denman* C. J. The sessions have found that he occupied as a servant.] There was a possibility of his holding after he ceased to be a servant. He might have been dismissed the service, and the master might have neglected to give him notice to quit at Michaelmas. If so, he would continue to occupy for a year. [Lord *Den-*

man C. J. There is nothing to show that he did not receive notice to quit both the service and the house at Michaelmas.] In *Rex v. St. Mary, Newington (a)*, it was said by Parke J. that it is not necessary to occupy as tenant to acquire this species of settlement. The pauper had an interest different from that of a servant. The finding of the sessions is immaterial, as they have submitted the whole of the facts to the consideration of the Court.

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 SNARE.

Lord DENMAN C. J.—In my view of this case there would be no holding of this house as a tenement until the service expired, construing the agreement most favourably to Mr. Knor. It does not appear either when the service expired, or that the pauper held the tenement a day after the service expired. It is stated that the pauper is not to be compelled to quit the house until he had notice to quit at Michaelmas. To quit what—the house or the service? It may have been both. If that is so, the sessions, by finding that the holding was always that of a servant, have certainly not apparently come to a wrong conclusion.

WILLIAMS J.—It is sufficient if there is evidence to support the finding of the sessions, and there certainly is. The utmost that can be urged as to the stipulation in the agreement, that the pauper was to quit at Michaelmas, is, that it has a tendency to show that the agreement was contrary to the finding. But I by no means think it is a fact that has a tendency so conclusive the other way as to induce me to say the sessions were wrong; on the contrary, it seems to me it might very well be explained, on the ground that this was a favour and indulgence which the man asked for; and which was conceded to him without any idea at the time of conferring on him any rights as a tenant.

COLERIDGE J.—The sessions have, in this case, to consider what was the agreement; and they draw a conclusion

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partly of law and partly of fact. It was incumbent on Mr. Knox to satisfy us that the sessions have necessarily drawn a wrong conclusion. If the evidence as to the agreement will bear the conclusion which the sessions have drawn, I think we ought not to disturb their finding. It seems to me that the sessions have very probably drawn the right conclusion. This was an agreement between a master and servant; it had throughout reference to wages and service; for that service the wages were to consist partly of money, partly of the keep of these cattle, and partly of the occupation of the cottage, and on that last circumstance the pauper may have said, as part of my remuneration is to be the occupation of the house, it would be very inconvenient to me to be turned out without any notice; as you might in an ordinary case dismiss me from your service without notice, I must ask of you to agree that I am not to be turned out of this house except on notice to quit at Michaelmas. Assuming even according to Mr. Knox's argument, that a six months' notice was meant, the agreement may have been that the pauper was not to be turned out of the service except on a six months' notice at Michaelmas. I think, therefore, this finding of the sessions may well be supported.

Order of Sessions confirmed.

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 January 25th.

The KING v. The Inhabitants of BERKSWELL.

UPON appeal against an order of two justices for the removal of *John Wilday*, his wife and family, from Berkswell c. 18, the whole of the subject-matter of the renting must be occupied. It is not sufficient if part to the annual value of 10*l.* is occupied. Thus, *A.* hired two cottages, being separate and distinct dwelling-houses, but adjoining to each other and under one continuous roof, together with three acres of land, for a year, from Lady-day 1832, at the rent of 14*l.* a year. At Lady-day *A.* entered upon one of the cottages and the land, and occupied the same under the hiring till Lady-day 1833. The other cottage he underlet to *S.* at a rent of 4*l.*, and *S.* occupied it till Lady-day 1833, and paid *A.* rent for it. *A.* paid the whole rents 14*l.* to the landlord. The cottage and land occupied by *A.* were worth more than 10*l.* a year. Held, that *A.* did not gain a settlement by this hiring and occupation of one of the cottages and land.

to Ballsall, both in the county of Warwick, the Court of Quarter Sessions quashed the order, subject to the opinion of the Court of King's Bench upon the following case :

Previously to Lady-day, 1832, the pauper hired two cottages, being separate and distinct dwelling-houses, but adjoining to each other, and under one continuous roof, together with three acres of land, situate in the respondent parish, for a year from Lady-day, 1832, at the yearly rent of 14*l*. The pauper entered into possession of one of the cottages and the land, and occupied the same, under the said hiring, till Lady-day, 1833. The other cottage he laid out money upon, and converted into a beer-shop, and underlet to *John Stoney* at a yearly rent of 4*l*., and *Stoney* occupied the same till near Lady-day, 1833, and paid the pauper the rent for it. The year's rent of 14*l*., reserved by the agreement for the whole property, was paid by the pauper to the landlord. The cottage and land occupied by the pauper were worth more than 10*l*. of the remainder of 14*l*. paid by him for the whole premises. If the Court of King's Bench should be of opinion, upon this state of facts, that the pauper gained a settlement in Berkswell, the order of sessions to be confirmed, but if not, the order to be quashed.

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Waddington and *G. Hayes* in support of the order of sessions. The pauper gained a settlement. It is admitted that it is settled by *Rex v. St. Nicholas, Rochester* (a), and *Rex v. St. Nicholas, Colchester* (b), that if a tenement consist of a single house, the entire house must be occupied. In the present case the pauper occupies a distinct dwelling-house and land ; is he to lose his settlement because he has taken another house ? If so, it would follow, that if he took 1000 acres and let one, he would not gain a settlement. All that the 1 *Will.* 4, c. 18, which recites the 6 *Geo.* 4, c. 57, means is, that the party must be the actual occupier of a

(a) 3 N. & M. 21; S. C. 5 B. & Ad. 219.

(b) 4 N. & M. 422; S. C. 2 A. & E. 599.


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separate and distinct house, or of a house and land, rented at the requisite sum. It is not improbable that a person might take twenty houses; is he to occupy all to acquire a settlement? It is clear the act could not have contemplated any thing so absurd. The only difficulty that can be suggested on the other side arises from the circumstance that the whole of the premises were taken at an entire rent, and it may therefore be argued that the Court cannot say that the separate house and land actually occupied by the pauper, were rented at the sum required by the act. But this difficulty has been completely removed by *Rex v. Pickering (a)*, where it was decided, that in the case of a farm taken at an entire rent, part of which was situated within the parish in which it was contended that a settlement was gained, and part in another parish, evidence was admissible for the purpose of ascertaining the relative value of the land occupied within the former parish. Upon the authority of that decision, the sessions have received evidence of the relative value of the house and land actually occupied by the pauper, and have found that it exceeded 10*l*. The house that was underlet may therefore be considered as out of the question, and a settlement will be gained by the pauper renting, occupying, and paying rent for a separate house and land rented by him at a sum exceeding 10*l*. It must be conceded on the other side, that upon this finding of the sessions a settlement would have been gained if the taking had been confined to the part which the pauper occupied; and it appears very unreasonable to argue that the settlement will be prevented in consequence of the pauper having done more than was necessary to give him a settlement. Such a course of argument seems at variance with the well-known maxim *omne majus continet in se minus*, and the rule that surplusage does not vitiate, but may be rejected. There is a plain distinction on this ground between the present case and the cases in which it was decided that underletting part of a house would prevent a settlement,

(a) 2 B. & Ad. 267.

Rex v. St. Nicholas, Rochester (a), and *Rex v. St. Nicholas, Colchester (b)*; for in those cases, if the part which the pauper underlet were rejected, the taking of the pauper would have been confined to part of a house; while here, if the part underlet be rejected, the residue fully answers the requisitions of the statute, and must have given a settlement if taken alone. If the house underlet had been situate out of the parish of Berkswell, the case could not be distinguished from *Rex v. Pickering (c)*, and it seems unreasonable to argue that the settlement is prevented because the pauper has taken another house in the parish, when it would have been gained if the other house had been situate out of the parish. The construction on the other side, that the whole taking must in every case be occupied, of whatever it may consist, appears at variance with the intention of the act, and by no means required by the words; for all that the statutes require is, that the tenement shall "consist of a house, &c." and that "such house or building, &c." shall be actually occupied. There are no words which require that the whole tenement taken shall be occupied; and the Court would not adopt a construction so unreasonable, unless they felt compelled to do so by the express language of the statutes. The language of all the judges in *Rex v. St. Nicholas, Rochester (a)*, shews that the principle of the decision in that case was, that the letting of lodgings would prevent a settlement being gained by the taker of the house so underlet in part; and Mr. J. Taunton says, "there must be an occupation, in fact, of a separate and distinct dwelling-house by the person hiring the same." Here there has been such an actual occupation; and the act being complied with in all other respects, a settlement was gained in Berkswell. It may be observed, with reference to *Rex v. Pickering (c)*, that the principle of apportionment adopted in that case was by no means a new one, but one well known to the law, for there are a variety of cases in which rents are

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(a) 3 N. & M. 21; 5 B. & Ad. 219.

(c) 2 B. & Ad. 267.

(b) 4 N. & M. 422; 2 Ad. & E. 599.

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actually apportioned, as in evictions of part of the demised premises by a stranger, and other cases (a).

Amos contra, was stopped by the Court.

LORD DENMAN C. J.—We think this statute cannot receive the construction contended for. Undoubtedly a great number of speculative questions may arise from that construction of the act which I think is the only true one, namely, that the subject-matter which forms the tenement should be occupied entirely by the party.

WILLIAMS J. (b)—I am entirely of the same opinion. Before the passing of this act complaints used to be made of the *equitable construction* which had been put upon the statutes on this subject; now that we have to construe a recent set of acts of parliament, at least we ought to avoid that error. Each of these acts has been in restriction of the right of gaining a settlement. It seems to me the fair and obvious meaning of 1 *Will.* 4, c. 18, is, that the whole subject-matter of the taking should be occupied; and from the plain and obvious meaning I think we ought not to depart.

COLERIDGE J.—I am quite of the same opinion, and I decide this case precisely on the same principle too; that is, desiring to give the full meaning to the plain words of the statute, and not allowing myself to speculate on what may be *equivalent* to it, or what may be within the spirit of it. I construe the statute simply according to its expressions. Looking at those expressions, I cannot doubt that it is necessary to say that the whole tenement, under the words of this statute, must be occupied by the person taking it—the whole tenement. And when we are pressed with the inconvenience or absurdity which may result from that, I cannot but recollect that exactly the same argument was used with regard to the whole rent. It was said, “suppose a man rents 1000*l.* a year, will you say he is not to gain a settlement, under the 6 *Geo.* 4, if he does not pay every

(a) See Co. Lit. 148 b; *Smith* (b) *Littledale* J. was absent on v. *Maling*, Cro. Jac. 160; 1 Rol. account of indisposition. Abr. 235.

farthing of that 1000*l.* a year rent, when 10*l.* would be enough?" The Court, however, then determined they would act on the words of the statute. If the decision leads to inconvenience, it will be easy for another act to be passed to remedy it. That seems the better course than for us to mould the words of the act.

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UPON an appeal against an order by two justices made against an order for the removal of *Robert Bartlett* and *Elizabeth* his wife, and *Mary Ann* and *Sarah*, the children of the said *Robert Bartlett* by a former wife, and *Elizabeth*, *Samuel* and *William*, the children of the said *Elizabeth Bartlett* by *Samuel Hord* her former husband, and *John* her illegitimate child, from the parish of Closworth to the parish of Pendermer. The Court of Quarter Sessions quashed the order, subject to the opinion of the Court of K. B. upon the following case, which, after setting out the order of removal, proceeded to state, that previous to the year 1817, the pauper, *Robert Bartlett*, an Englishman, being then of age, was at Twillingate in Newfoundland, in the employ of Messrs. *Colbourne & Son*, of Sturminster Newton, in Dorsetshire, who had a mercantile establishment in Newfoundland, and at Poole in Dorsetshire, and were Newfoundland merchants. *John Colbourne*, the son, occasionally resided in each place, and the home of *Colbourne's* vessel, on board of which the pauper served, was the port of Poole. In the beginning of the year 1817, the pauper bound himself to Mr. *John Colbourne* by an indenture of apprenticeship for three years, to serve as an apprentice on board any vessel Mr. *Colbourne* might have. The instrument was not executed in England, but in Newfoundland, and was signed and sealed by the pauper and his master, then residing in Newfoundland. It was not stamped at the

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time of its execution, nor within two months afterwards; but at the hearing of the appeal was given in evidence, bearing an English one pound stamp, and a receipt for the penalty indorsed. No evidence was given of the law of Newfoundland relating to such instruments, but it was admitted—"that legal indentures executed in Newfoundland, do not, according to the laws of that island, require a stamp, in order to render them valid there."

The pauper, *Robert Bartlett*, served under the above instrument for more than forty days in the parish of Saint James, in Poole, in the county of Dorset. It was admitted, and the sessions adjudged, that the instrument, if executed in England duly stamped, was a valid indenture of apprenticeship. And the question is, whether the binding was a valid one, so as to confer a settlement by service under it in England (*a*). If the above instrument be sufficient to confer a settlement, the order is to be quashed altogether.


Kinglake in support of the order of sessions. Residence in this country under an indenture made abroad, does not confer a settlement. The 13 & 14 Car. 2, c. 12, is the first legislative recognition of a settlement by apprenticeship, although, by the resolutions of the judges of assize in 1683 (*b*), it had been previously held that an apprentice might gain a settlement. The words of the statute authorize two justices of the peace to "remove persons to such parish where he or they were last *legally* settled, either as a native, householder, sojourner, *apprentice*, or servant, for the space of forty days at the least." It is necessary, therefore, to see what and who the apprentice was at the time of the 13 & 14 Car. 2, as it is only by residence as an apprentice of the sort and character there recognized, that a settlement can be gained at the present day. The enactments on that

(*a*) Another question for the consideration of the Court was stated in the case, but the deci-

sion of the Court makes any mention of it unnecessary.

(*b*) See Dalt. Just. 113, ed. 1655.

subject are chiefly comprised in the 5 *Eliz.* c. 4, from the various provisions of which statute the meaning of the word "apprentice," as then understood in England, may be collected. By that act householders only are authorized to take apprentices. Sect. 25, empowers husbandmen, being *householders*, to take apprentices. Sect. 26, empowers *householders dwelling in towns* corporate to take apprentices. Sect. 28, empowers householders in market towns not incorporate to take apprentices. A meaning is thus discovered for the word "apprentice" in the 13 & 14 *Car.* 2; it means one bound to a householder and having the other qualifications required by the 5 *Eliz.* c. 4; in other words, it means a person bound according to English law, and in no way applies to persons bound abroad. [*Coleridge J.* That statute also requires that the binding shall be for seven years, and that all indentures otherwise than is by that statute ordained, shall be clearly void to all intents and purposes, and yet it has been held that a binding for a less time confers a settlement (*a*).] The Court has held, that if an indenture is entered into for a less period, the act is not to be construed so strictly as to consider it void at the time of being made, but only voidable if the parties bound choose to take advantage of it; nevertheless such indenture was still a binding under 5 *Eliz.* c. 4. But the question here is, whether a binding abroad constitutes the *apprentice* intended by the legislature, not whether the binding has sufficiently complied with the provisions of English statutes. The 5 *Eliz.* c. 5, is an act by which fishermen were enabled to take apprentices, and it provides that "the bond of apprenticeship be made by writing indented and inrolled in the town where the apprentice shall be then inhabiting, if it be a town corporate, and if the town be not incorporate, then to be inrolled in the next town incorporate to the habitation of every such apprentices;" which also shews that the apprentices must be bound in this country. It is true that many of the provi-

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(a) See cases collected 1 Nolan, 500, et seq.

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sions of 5 *Eliz.* c. 4, have been repealed, but the language of that statute is referred to in order to shew the meaning of the word "apprentice," as used in the 13 & 14 *Car.* 2. After the act of 13 & 14 *Car.* 2, authorizing the removal of a person to the parish where he is settled as an apprentice, the 1 *Jac.* 2, c. 17, s. 3, was passed to prevent the forty days' continuance of any person in a parish from conferring a settlement, unless notice in writing be given to the churchwardens. The 3 *W. & M.* c. 11, made an exception in favour of apprentices. Sect. 8, enacts, "if any person shall be bound an apprentice by indenture, and inhabit in any town or parish, such binding and inhabitation shall be adjudged a good settlement, though no such notice in writing be delivered and published as aforesaid." That act does not create the settlement by apprenticeship, but exempts from the necessity of giving notice the apprentice gaining a settlement under 13 & 14 *Car.* 2, by the use of the words "bound by indenture," which shews that the apprentice mentioned in 13 & 14 *Car.* 2, must be bound by indenture, and consequently such an apprentice as was contemplated by 5 *Eliz.* c. 4. It is submitted, therefore, that whenever apprenticeship is mentioned in the law as a title to settlement, it means an apprenticeship of an Englishman bound in this country. If a binding abroad be considered sufficient, the slaves apprenticed in the West India Islands, under 3 & 4 *Will.* 4, c. 73, may go through the formality of binding by indenture and be imported into this country, and the burthen of supporting them be thrown, after a few days' service, upon any parish where they land. *St. Nicholas v. St. Peter's (a)* may be cited for an observation of the Court, which shews that the 3 *W. & M.* c. 11, takes up the settlement by apprenticeship where it found it, and applies to the apprentice as bound under 5 *Eliz.* c. 4. Lord Hardwicke C.J. said, "The construction of both statutes must be the same." From this it must be inferred, that as the 3 *W. & M.* had in view the settlement by apprenticeship, under 13 & 14 *Car.* 2,

(a) Bott, 63, ed. 1807; S. C. Burr. S. C. 91.

the word "apprentice" in the latter statute means an apprentice bound according to English law. As to the indentures in the present case, there are many acts imposing certain stamps, and various regulations as to apprentices, all of which have reference only to English bindings; and therefore a person bound under an indenture in a foreign country, so as to be an apprentice there, if such binding be considered sufficient, may evade all the provisions of such acts. But this being a foreign contract, must be construed according to the law of the country where made (a). It is not shewn in this case that these indentures were made according to the law of Newfoundland, which it was incumbent upon the other side to make out. In *Cosio v. De Bernales* (b), which was an action for money had and received by a husband and wife who had carried on trade in Spain, as partners, according to the law of that country, *Abbott C. J.* nonsuited the plaintiffs, because they had not shewn that, by the law of Spain, a feme covert could carry on trade. So also in *Pinero v. De Bernales* (b) *Abbott C. J.* held that the plaintiffs were bound to prove that they were a corporation by the law of Spain (c). This is a Newfoundland contract, and the party seeking to use it must prove that the relation of apprentice was thereby established in Newfoundland.

Sir *W. W. Follett* contra, was not called upon by the Court.

LORD DENMAN C. J.—In this case, it appears to me, a good settlement has been gained under this indenture. The objection made to it is grounded on the 13 & 14 *Car. 2*, c. 12, which speaks of an apprentice legally settled; and no doubt, at the time that statute was passed, the apprentice


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(a) See *De la Vega v. Vianna*, 1 B. & Ad. 284; *Huber v. Steiner*, 2 Bing. N. C. 202.

(b) R. & Moo. 102; S. C. 1 C. & P. 266.

(c) See also *Res v. Brampton*, 10 East, 282; *Ganer v. Lady Lanesborough*, Peake's N. P. C. 17; *Alves v. Hodgson*, 7 T. R. 241; *Snaith v. Mingay*, 1 M. & S. 87.

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contemplated by the legislature must have complied with the requisites contained in the 5 *Eliz.* c. 4. To what extent those requisites must have been complied with it is not necessary now to inquire, as the 54 *Geo.* 3, c. 96, after reciting the divers rules laid down by that statute respecting the taking of apprentices, enacts, that so much of the said recited act shall be repealed, and that it shall and may be lawful for any person to take or become an apprentice, though not according to the provisions of the said act. The objections therefore on the 5 *Eliz.* c. 4, fall to the ground. The provisions of the 5 *Eliz.* c. 5, which applies to seamen's apprentices, are then brought before our notice, to shew that an apprentice must be bound in this country; but *Rex v. Gainsborough* (a) is a decision upon that very statute, and shews that non-compliance with the provisions referred to, does not vitiate an indenture. Lord *Hardwicke*, indeed, in *St. Nicholas v. St. Peter's* (b), said that the construction of both statutes (meaning the 3 *W. & M.* and the 5 *Eliz.*) must be the same; but he only in fact added an immaterial term to his judgment, for all bindings by apprenticeship were at that time in some way or another connected with the 5 *Eliz.* c. 4, and it is *clear* Lord *Hardwicke* did not mean to say that all the provisions in that act relating to apprentices should be complied with to confer a settlement. With regard to the law of Newfoundland, there is certainly nothing to shew that this indenture is according to the forms required there; but I do not think that is necessary, as a contract of teaching and learning is *primâ facie* a legal contract, requisite for the conduct of trade in all parts of the world, and it is found expressly that the apprentice was of age at the time that he bound himself. Had that not been so, a question might have arisen as to the necessity of shewing that an infant could bind himself by the laws of that colony (c). But that difficulty does not arise. I therefore think that the inden-

(a) Barr. S. C. 586.

are referred to and altered by several statutes. See 5 *Geo.* 4, c. 68;

(b) Barr. S. C. 91.

(c) The laws of Newfoundland

5 *Geo.* 4, c. 67, 2 & 3 *Will.* 4, c. 78:

ture is valid, and that the residence under it in this country has conferred a settlement.

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WILLIAMS J.(a)—I am of the same opinion. It appears to me that this was a legal contract entered into between these parties, both of whom were competent to contract, and that the relation contracted between them was that of master and apprentice. The different acts of parliament have been relied on to shew that nothing can be valid as an indenture of apprenticeship, except what is in compliance with the rules laid down in them, but the case adverted to by my lord. shews that that is not so. In the cases also where there has been a binding for less time than seven years, although the strong language of the stat. 5 *Eliz.* c. 4, has been forcibly urged in argument, that indentures not in compliance with the act “shall be clearly void in the law to all intents and purposes,” there are many decisions which shew that a binding for a less period is valid. It seems to me that there is nothing in the case to shew that these parties did not legally contract the relation of master and servant, and therefore the residence of forty days under the apprenticeship in the township in question conferred a settlement.

COLERIDGE J.—Taking the two statutes of 13 & 14 *Car.* 2, c. 12, and the 3 *W. & M.* together, one mode of gaining a settlement is created by being bound an apprentice by indentures, and by forty days’ residence in a parish under that apprenticeship. It has been said to-day, (reversing the order of the arguments used,) that a settlement has not been gained under this indenture, for two reasons; first, that there is no proof of there being any contract of apprenticeship, as this instrument was made in a foreign country, and there is no evidence to shew that it is according to the laws of that country; and secondly, that the case is not brought within the settlement laws. It is very true that no evidence has been

(a) *Littledale J.* was absent on account of illness.

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given of the law of Newfoundland on that subject; but this is a written contract entered into between the two parties, which the Court can look at. Apprenticeship is, in other words, merely a contract to teach and to learn, and we have a right to look into the instrument to see whether, on a fair construction, the language of this instrument imports such a contract; for, if so, it must be taken to be, until something else be shewn to the contrary, a contract of apprenticeship. But then it is said, as it appears this contract was entered into in a foreign country, it is not within the purview of the acts relating to settlement. The argument is, that the statutes of *Charles*, and of *William & Mary*, are to be construed with reference to the statute of *Elizabeth*, which was the foundation of apprenticeships; and that that statute clearly imports that the party bound must be resident in this country, and the regulations as to husbandmen and householder—tradesman in a corporate town—householder—inrolment at the next market town, and so on, are referred to, all for the purpose of shewing that the statute refers only to contracts made in this country. It seems to me that that argument could only be sustained on the supposition that no contract of apprenticeship is good for the purpose of a settlement, unless it is made in strict compliance with the statute of *Elizabeth*. But that cannot be maintained by any lawyer; for although the words of that statute are strong, as my brother *Williams* has just pointed out, yet from an early period it was held, (and decision after decision has gone to that effect,) that for the purpose of a settlement when there has been *de facto* a binding and a service, the settlement shall be acquired. It was held indeed that it should be acquired, although not merely the provision as to time, but every one of the provisions of that statute were broken through; although it was questionable whether the master himself had a right to take an apprentice, which right only grows out of that very condition of being a householder, that has been so much relied upon to-day to shew that the act can only have reference to

a contract made in this country. For it has been determined that a mere lodger, not holding a house, was able to take an apprentice (a).

Order of Sessions discharged.

(a) See *Rex v. St. Petros*, 4 T. R. 169, and 1 Nolan, 498. See also *Rex v. Fox*, 1 Salk. 66.

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The KING v. The Inhabitants of HENLEY UPON THAMES. *Wednesday, January 25th.*

BY an order of removal *Matthew Chipp*, Ann his wife, and their four children, were removed from the parish of Henley upon Thames, in Oxfordshire, to the parish of Burghfield, in Berkshire; and on appeal this order was quashed, subject to the opinion of this Court on the following case:—

The pauper, *Matthew Chipp*, acquired a settlement previously to 1819 in the appellant parish of Burghfield. In 1821 the pauper, being in trade as a mealman, and resident in Henley upon Thames, hired of a person of the name of *Paulin* a granary at the rent of 4*l.* a year. The granary was an upper one, forming one entire floor, and above a granary, which stood in a yard belonging to a dwelling-house of the said *Paulin*, in Henley upon Thames, which yard opened by a gateway on the high road. The two granaries adjoined to and were under the same roof with a stable, and were detached from the dwelling-house. There was no internal communication between the lower granary and the upper granary, or between the upper granary and the stable, the only entrance to the upper granary being a separate and distinct entrance from the outside, by means of a movable ladder placed in the yard, and reaching from the ground to a door on the side of the same granary. In 1822, whilst the pauper still held this granary, he hired of one *Mayor* another granary or loft, in Henley upon Thames, at the rent of 7*l.* a year. This last granary was one entire floor, and was over a stable in a yard behind the dwelling-

A granary, forming an entire floor, having no internal communication with the rest of the building, and only to be entered by a ladder from the ground, is not a separate and distinct building within the meaning of 59 Geo. 3, c. 50, so as to confer a settlement.

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house of Mayor. The stable and granary were detached from the last-mentioned dwelling-house, and there was an approach to them without entering the dwelling-house. There was no internal communication between the stable and granary, the only entrance to the granary being a separate and distinct one from the outside, by means of a movable ladder placed in the yard, and reaching from the ground to a door in the side of the granary. The pauper held both the granaries above mentioned together for more than a year, and during that time the rent for the same was duly paid by the pauper, who during all that time resided in the parish of Henley upon Thames.

The question for the opinion of this Court is, whether, upon these facts, the finding is warranted that the two granaries above mentioned are separate and distinct buildings within the meaning of the stat. 59 Geo. 3, c. 50. If the Court shall be of opinion that the two granaries are separate and distinct buildings within the meaning of that statute, the order of sessions is to be confirmed,—if otherwise, the order of sessions is to be quashed.

Chilton, in support of the order of sessions. It would have been difficult to contend that the granaries occupied by the pauper in this case could confer a settlement as a separate and distinct building, under the 59 Geo. 3, c. 50; but for the cases of *The King v. Macclesfield* (a) and *The King v. Wootton* (b). Those cases shew that the act does not require the premises occupied to be one separate and distinct building, for in *The King v. Wootton* (b) the pauper rented two cottages at the same time in different parts of the parish, and they were held to come within the words of the act. In *The King v. Macclesfield* (a) the first house occupied by the pauper consisted of a house place, a chamber over it, and over that a garret, which was over the lower rooms in the adjoining house, but with which there was no internal communication. He afterwards took

(a) 2 B. & Ad. 870.

(b) 3 N. & M. 312; S. C. 1 A. & E. 232.

the adjoining house, which was under his garret, and which he underlet; and it was held that he gained a settlement by renting these two, "being a separate and distinct dwelling-house or building." *Parke J.* said—"It appears to me not to be less a tenement within the meaning of the act when one detached house is occupied with another. It is not, however, necessary to decide that point here." *Patteson J.* said—"It is not necessary now to decide whether the occupation of two distinct dwelling-houses or buildings in different parts of a parish will be sufficient or not." That was afterwards decided in the affirmative in *The King v. Wootton (a)*. In the present case the only entrance to the granaries was by placing a ladder against the buildings, and they were quite as distinct and separate from any other buildings as chambers.

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Maule (*Cooper* was with him). The 59 *Geo. 3*, c. 50, requires that the tenement, to gain a settlement, shall be "a *separate* and *distinct* dwelling-house or building," and it seems impossible to give any construction to the words "separate and distinct" if they do not exclude upper floors of a building. The very object of the act was to exclude any such question as is now raised on the occupation of rooms. That which in ordinary language is a separate and distinct building, will, with the other requisites, confer a settlement under this act; but can any one contend that these upper floors are separate and distinct buildings?

(He was then stopped by the Court.)

The COURT (*b*).—We all agree that that is the rational construction of the act. The order of sessions, therefore, must be quashed.

Order of Sessions quashed.

(a) 3 N. & M. 312; S. C. 1 A. *liams* and *Coleridge* Js.; *Little- & E. 232.* *dale J.* was absent from indisposi-

(b) Lord *Denman* C. J., *Wil-* tion.

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Where a pauper was hired in the parish of A., in June, 1833, at a monthly hiring, and served under that hiring till the following Michaelmas, and then was hired on a yearly hiring till Michaelmas, 1834, under which she served; held that her contract of hiring and service was not completed at the time of the passing the 4 & 5 Will. 4, c. 76, (Aug. 14, 1834,) so as to gain a settlement in A.

REX v. The Churchwarden and Overseers of RETTENDEN,
in the county of Essex.

UPON appeal against an order of two justices of Essex, dated 20th March, 1835, whereby *Sophia Attridge*, single woman, and her illegitimate male child, aged fourteen weeks, were removed from the parish of Rettenden, in the county of Essex, to the parish of Ingatestone, in the same county, the sessions quashed the order, subject to the opinion of this Court on the following case:

On the 28th of June, 1833, the pauper, *Sophia Attridge*, went into the service of one *Elizabeth Baker*, widow, as her servant, for a month, at wages of 1s. a week. The pauper continued in the service of the said *Elizabeth Baker* until the expiration of the month, and was then hired by the said *Elizabeth Baker* to be her servant till the following Michaelmas, at the like wages of 1s. a week, and the pauper continued to serve the said *Elizabeth Baker* up to the said Michaelmas. At that Michaelmas the pauper was hired by the said *Elizabeth Baker* to be her servant for the following year, at the wages of 50s. a year, and the pauper continued to serve the said *Elizabeth Baker* during the whole of such year. From the time of the first hiring in June, 1833, till Michaelmas, 1834, there was an unbroken continuance of service, and the pauper always resided in the house of the said *Elizabeth Baker*, which was in the said parish of Rettenden.

The question for the consideration of the Court is, whether, reference being had to the 4 & 5 Will. 4, c. 76, s. 65, the pauper, under the circumstances hereinbefore stated, gained a settlement in the said parish of Rettenden.

If the Court shall be of opinion that the pauper did gain such settlement, the order of sessions is to be confirmed, otherwise it is to be quashed.

Knor and *C.R. Turner*, in support of the order of sessions.

The question turns upon the 65th section of the New Poor Law Act. Sect. 64, takes away a settlement by hiring, and settlement altogether, but it is entirely prospective, from which it may be inferred that the legislature did not intend to interfere with a settlement already acquired: then sect. 65, enacts, "that no person under any contract of hiring and service, not completed at the time of the passing of this act, shall acquire, or be deemed to have acquired any settlement." The words "not completed" must mean a contract not completed according to the law, as it stood at the passing of the act. But this contract was completed, and a settlement was in fact already gained, before the passing of the act, for the hiring for the year was completed at the instant by the act of hiring, and the service under the hiring for the year might be coupled with the service under the lesser hiring, so as to confer a settlement. Suppose that, instead of the first hiring having taken place in June, 1833, it had taken place in the previous September, not only might a settlement have been acquired before the passing the new act, but it might have occurred that an order of removal to Ingatestone might have been made, and have been the subject of an appeal before the act passed, in which case the settlement must have been adjudged to be at Rettenden; surely it could not have been the intention of the legislature to interfere with a settlement so adjudicated upon; the true meaning of sect. 65, is, that where a settlement was in progress at the time of the passing of the act, but required service after the act, to complete it, then it should not be acquired. It seems clear that the clause was not intended to be retrospective, for in sect. 68, where settlements by estate are taken away, different language is used; "no person shall be deemed to *retain* any settlement." It is therefore not too much to suppose, that if the legislature intended to interfere retrospectively with settlements gained, it would have done so in express terms. In *The King v. St. Mary-le-bone* (a)

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 v.
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 and
 Overseers of
 RETTENDEN.

(a) 4 B. & Ald. 681.

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it was held, that the words of 59 *Geo. 3*, c. 50, applied to settlements in progress, but there the pauper had not resided forty days, under the yearly contract, at the time of the passing of the act. That case is therefore distinguishable from the present; for here the pauper had served more than forty days before the passing of the act.

Ryland and Calvert contra, were not called upon by the Court.

LORD DENMAN C.J.—It does not seem quite certain that the legislature contemplated this exact case, or what they would have done if they had, but the words of the act leave no doubt on the matter. The service is not complete, and within this act the settlement is not obtained. It is quite immaterial to the public and to the pauper, where she is settled, but it is very important that due effect should be given to all the words of this act, and also that it should come into operation as soon as possible.

WILLIAMS J.(a)—I am entirely of the same opinion. It seems to me clear that this contract was not complete at the time of the passing of the act. The argument is, that by the old law, by coupling service, as it was called, when there was a service in fact for a year, and a hiring for a year, although the service was not for a twelvemonth under the yearly hiring, a settlement was gained before the passing of the act; but by the new law the contract for service, as well as the contract of hiring, must be completed before the passing of the act, and that contract has been cut in twain by the act of parliament.

COLERIDGE J.—Before this act of parliament passed, under the circumstance of this case, a settlement might have been acquired without even completing that contract of hiring and service, under which however the settlement

(a) *Littledale J.* was absent from indisposition.

would take place: the contract for hiring and service being one, and being entered into, if there had been sufficient service under that, coupled with service under a weekly or monthly contract, the settlement would have been acquired; but this act says no person shall be judged to have acquired a settlement by such hiring and service, unless the contract of hiring and service shall be complete at the time of this act being passed. How has that been done? The contract under which the settlement was to be acquired, had not been completed at the time this act passed, and therefore I do not see how it is possible to get over the words of this act.

Order of Sessions quashed.

THE KING v. GEORGE.

*Wednesday,
January 25th.*

UPON an appeal to the quarter sessions for the Isle of Ely, against a rate laid for the relief of the poor of the parish of Tid St. Giles, the Court confirmed the rate, subject to the opinion of the Court of King's Bench upon the following case:

The notice of appeal stated, that the said *John George* is not rated and assessed in the said rate, for and in respect of a messuage or dwelling-house, occupied by him, within the said parish; and further, that the said rate is in other respects illegal, unequal, oppressive, and unjust. At the hearing of the said appeal, it was proved that the house had been rated, during the occupancy of a former tenant, and up to the time when it ceased to be occupied, at 6*l.* a year, but that the last rate was not paid; that it had been unoccupied for a short time; that on account of the difficulty of obtaining payment of the rates, it was not afterward rated; that the appellant had then become occupier, had expressed his willingness to be rated, and had requested the parish officers to rate him, but they had not done so; that the

The simple fact of being left out of a poor's rate, where no improper motives are shewn for making the omission, is no ground for an appeal against a rate.

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parish officers have not of late rated similar houses, on account of the difficulty in obtaining the rates. If the Court of K. B. be of opinion that the grounds of appeal stated in the notice are sufficient, and that the said appellant ought to have been rated in the said rate, then the said rate to be amended in that particular, and the order of session quashed; if otherwise, both are to be confirmed.

Thesiger and *G. Hayes* appeared to support the order, but the Court called upon *Crompton*, to shew what grievance the party complained of in not being rated.

Crompton. It is certainly novel to complain of not being put upon the rate, but now that many privileges are conferred upon rated inhabitants by acts of parliament, it is submitted that every inhabitant occupying ratable property is aggrieved if he is left out. It would be giving enormous power to the parish officers, to allow them to rate inhabitants or not, at their pleasure. By 4 & 5 *Will.* 4, c. 76, s. 40, the right of voting for guardians, or at any election under the act, is regulated according to the amount of property, in conformity with 59 *Geo.* 3, c. 69; if therefore the names of small rate-payers may be omitted from the rates, elections may be thrown into the hand of the rich exclusively. *Mr. Nolan*(a) states that the grounds of appeal were pointed out by Lord *Mansfield* as follows:—"Where there is a franchise to be enjoyed, a man shall not be left out (of the rate) to deprive him of his franchise." No reason is shewn for leaving out the appellant's property, and it is not necessary for the appellant to point out any particular grievance under which he labours in being left out, as that is sufficiently suggested by the law of the land.

LORD DENMAN C. J.—It is impossible not to see, that although rates may be imposed upon all the inhabitants and occupiers of a parish, it is a *power* given to the churchwardens, and not a *duty* thrown upon them, although various

(a) 2 *Nol.* 486-7, 4th ed.

rights may result from the fact of being rated afterwards. I think the reason given for not rating the appellant may be a very good one, as there might be more expense in collecting the rates on small tenements, than the whole of them when collected would amount to. And again, if a small sum only were wanted in the parish, it might be raised without applying to nine-tenths of the inhabitants. In the absence, therefore, of any grievance being suggested by the appellant, such as the leaving out his name through undue motives, or the fact of property similar to his having been rated, the order must be confirmed.

WILLIAMS J. concurred.

COLERIDGE J.—I am of the same opinion. The appeal is given (a) in case any person shall feel himself aggrieved by any rate or assessment for the relief of the poor, or shall have any material objection to any person being put on or left out of the rate. But I cannot see that the simple circumstance of being left out of a rate, necessarily imports a grievance. And no fact is stated in this particular case, to shew that any grievance has arisen.

Order of Sessions confirmed:

(a) 17 Geo. 2, c. 38, s. 4.

The KING v. The Churchwardens and Overseers of
STOKE DAMEREL.

UPON an appeal against an order of two justices for the removal of *Thomas Pearce* and *Elizabeth* his wife, from the parish of Stoke Damerel to the parish of Plympton Maurice, in Devonshire, the Court of Quarter Sessions quashed the order, subject to the opinion of the Court of K. B. upon the following case :

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A settlement may be gained by the payment of parochial rates for a tenement not occupied according to the 1 Will. 4, c. 18, if the

occupation satisfies the provisions of the 6 Geo. 4; c. 57.

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It was admitted by the parties that the pauper, *Thomas Pearce*, had gained a settlement in Plympton Maurice; that subsequently to having gained such settlement, and also subsequently to the passing of the statute 1 Will. 4, c. 18, the pauper, *Thomas Pearce*, rented a house in Stoke Damerel at a rent of 16*l.* a year, paid his year's rent, was rated for the house to the parochial rates, and had paid such rates, but that during the whole of such tenancy the pauper, *Thomas Pearce*, had underlet a portion of such house, of the value of 4*l.* a year, to one *Knepman*.

It was contended by the appellants, that though the pauper was prevented by the statute 1 Will. 4, c. 18, from gaining a settlement in Stoke Damerel by such renting, he the pauper having underlet, and therefore not having occupied the house as required by such statute, yet still he had gained a settlement in Stoke Damerel by such payment of parochial rates.

The question for the opinion of the Court is, whether the pauper, *Thomas Pearce*, did gain a settlement in Stoke Damerel by such payment of rates. If he did, he has been improperly removed to Plympton Maurice; if he did not, he was properly removed.

J. Greenwood, in support of the order of sessions. The settlement by being rated and by payment of rates, was given by the express words of 3 W. & M. c. 11, s. 6, and is still a subsisting head of settlement. By the 35 Geo. 3, c. 101, s. 4, it was indeed enacted that no person should gain a settlement by being charged with and paying his share towards the public taxes or levies of the parish, in respect of any tenement not being of the yearly value of 10*l.*, and it was thought that this kind of settlement was wholly taken away by that statute. Lord *Kenyon* said, extra-judicially, in *The King v. Islington (a)*, "it was intended to make an end of this head of settlement law in future;" and Lord *Ellenborough* gave a distinct

(a) 1 East, 283.

opinion to the same effect in *The King v. Penryn* (a). The question, indeed, did not often arise; for as a settlement was gained by occupying a tenement of the yearly value of 10*l.* for forty days, there was no occasion to claim it by the payment of rates, which would in general only be adding evidence to a complete proof of a settlement upon a tenement. But when the 59 *Geo.* 3, c. 50, imposed restrictive qualifications upon the settlement by renting a tenement, recourse was had to the old mode of settlement by rating, which was merely obsolete, and not repealed; and in *The King v. St. Pancras* (b) the question was much discussed, when the Court was of opinion that rating and payment of rates still formed a distinct head of settlement; and that decision has been since confirmed in *Rex v. Penryn* (c). This was the state of the law till the passing of the 6 *Geo.* 4, c. 57, which enacted that no person should gain a settlement by reason of *settling upon, renting, or paying* parochial rates for any tenement, unless the tenement should be rented at 10*l.* per annum, or should be occupied under such yearly hiring, and the rent for one whole year be actually paid. Here again the settlement by paying rates was merged, because, before the proof of such settlement could be arrived at, a settlement by renting a tenement was incidentally made out. But although merged or suspended, settlement by rating still existed. The language of the act of 6 *Geo.* 4, itself treats it as a head of settlement, not abrogated, but subjected to new restrictions. To this effect *The King v. Great Wakering* (d) is an authority, where one of the questions was, whether a settlement had been gained since the passing of that statute by the payment of rates; and two of the judges treat the settlement by payment of rates as a still subsisting head of settlement, but subject to the same qualifications (with reference to the facts then before them) as the settlement by renting a tenement. The 1 & 2 *Will.* 4, c. 42, s. 5, is

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(a) 5 M. & S. 443.

(c) 1 N. & M. 74; S. C. 4 B.

(b) 9 Dowl. & R. 343; S. C. 2 B. & C. 122.

& Ad. 224.
(d) 3 N. & M. 47; 5 B. & Ad. 971.

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a legislative authority to the same effect, as that enacts that no person shall gain a settlement by renting and occupying, or paying parochial rates for lands to be let to hire by the churchwardens under that act.

This head of settlement, then, still subsisting up to and after the 6 *Geo.* 4, c. 57, is unaffected by 1 *Will.* 4, c. 18, the enacting part of which is silent as to rating and payment of rates. But this statute having introduced a new restriction as to settlement by renting a tenement, it is again convenient to have recourse to settlement by payment of rates. The 1 *Will.* 4, c. 18, after reciting the 6 *Geo.* 4, c. 57, and that doubts had arisen respecting the intention of the legislature as to the occupation of the house, building or land by the person hiring the same, proceeds to enact that no person shall gain a settlement by reason of such yearly hiring of a dwelling-house as in the said act (6 *Geo.* 4) is expressed, unless such house, &c. shall be *actually* occupied under such yearly hiring by the person hiring the same for the term of one whole year at the least, and unless the rent for the same, to the amount of 10*l.* at the least, be paid by the person hiring the same.

That act was introduced to meet the doubts which were entertained as to the meaning of the word *occupied* in 6 *Geo.* 4, c. 57, as this Court held, in *The King v. Ditchet* (a), that a person who rented a house at 10*l.*, and underlet part, gained a settlement under the statute. Under the 1 *Will.* 4, c. 18, this Court giving effect to the word *actually*, in that statute, but not overruling *Rex v. Ditchet*, held that a constructive occupation was no longer sufficient: *Rex v. St. Nicholas, Rochester* (b), *Rex v. St. Nicholas, Colchester* (c). But although by the latter act a settlement cannot be gained by renting a tenement unless there be actual occupation, it contains nothing to prevent a settlement being acquired by rating, under the authority of *Rex v. Ditchet* (a), where the house is of an annual rent,

(a) 4 M. & R. 151; S. C. 9 B. Ad. 219.

& C. 176.

(c) 4 N. & M. 422; 2 A. & E.

(b) 3 N. & M. 21; 5 B. & 599.

&c. to satisfy the 6 *Geo.* 4, c. 57, though part be underlet. That statute contained provisions as to settlement by renting and settlement by *rating*, and as 1 *Will.* 4, c. 18, recites the *whole* of the act, the title and recital and enactment of which relate to, and make provisions for, the settlement by payment of rates as well as the settlement by renting, while the stat. 1 *Will.* 4, c. 18, itself, in its enacting clause, drops the settlement by rating, and makes provisions only for the settlement by renting, the inference is irresistible, that the law as to settlement by rating was intended to remain where it was. It may perhaps be said that the legislature, in the last act, thought that the settlement by rating was exploded, but so probably was the case when the 59 *Geo.* 3, c. 50, was passed; per *Bayley J.*, in *The King v. St. Pancras* (a), but he said that if that was the notion, the error was to be remedied by Parliament.

The only question therefore is, whether, under the 6 *Geo.* 4, c. 57, this would be a good settlement; and on that point *The King v. Ditchet* (b) is conclusive.

Crowder contra. The legislature, in passing these acts, found the decisions of this Court at variance with the spirit of the statutes. In 6 *Geo.* 4, c. 57, they intended that the occupation of a 10*l.* tenement should be by the person hiring the same, but as the words did not carry out that intention, the 1 *Will.* 4, c. 18, was passed to effectuate it. The only alteration made in the law therefore by that act, was to require actual occupation. [*Coleridge J.* The 6 *Geo.* 4, c. 57, mentions settlement by renting, or paying rates, but the 1 *Will.* 4 only mentions settlement by renting; and it may have been the intention of the legislature to leave the settlement by paying rates where it was, as that is a mode of gaining a settlement not open to the doubts and controversies which settlement by renting occasioned.] It is submitted that it was intended to include both; for the 1 *Will.* 4 enacts that no person shall acquire a settlement by reason of *such yearly hiring*, as in the said act (a) 3 D. & R. 343; S. C. 2 B. & C. 122. (b) 4 M. & R. 151; S. C. 9 B. & C. 176.

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expressed. The yearly hiring, expressed in the 6 Geo. 4, c. 57, was, that no person was to gain a settlement by renting or paying rates for any tenement, unless he rented it at 10*l.* a year, and occupied it under such yearly hiring. As the only alteration intended in the law was to require actual occupation of the tenement, it would have been needless to repeal any enactment as to the payment of rates. The Court will stretch the language of the act to give effect to what is the clear intention of the legislature, which has been in all these acts to get rid of settlement by rating. It may be contended therefore absolutely that no settlement can be gained by rating; for as the 6 Geo. 4 enacted that no settlement should be gained by paying rates if the house was under the annual value of 10*l.*, and as renting a 10*l.* tenement gave a settlement without payment of rates, that statute virtually repealed settlement by rating.

Lord DENMAN C. J.—I certainly believe that the legislature intended to get rid of the settlement by rating, in these acts of parliament; but so Lord *Ellenborough* thought they did by the 35 Geo. 3, although in point of fact they did not carry that intention into effect, and that head of settlement re-appeared some years afterwards. When the 6 Geo. 4, c. 57, passed, it cannot be doubted that a person might gain a settlement by the payment of rates, and the effect of that statute was to prevent the occupier of a tenement gaining a settlement by such means, unless the tenement were of a certain description. Then comes the 1 Will. 4, c. 18, in consequence of some decisions of this Court, and that act recites the whole of the 6 Geo. 4 as to the means of gaining a settlement by paying of rates or renting a tenement, and enacts that no person shall gain a settlement by renting a tenement, unless the tenement be of a certain description, omitting in that enacting part the settlement by payment of rates, mentioned in the previous statute. How is it possible then for us to say that the legislature (supposing they had such an intention)

have actually carried into effect the intention of preventing the gaining of a settlement by rating? There may be, as my brother *Coleridge* suggested, a reason imagined why they should not have intended it; because certainly the settlement by payment of rates is one of those least susceptible of dispute. It is easily ascertained by a public document whether or not a party was paying rates, and that would avoid all those nice questions which caused so much litigation in former times. *

But believing, as I certainly do, that the legislature meant to get rid of the settlement altogether by payment of rates, still I cannot see they have taken effectual means for doing so. I think therefore the settlement by the payment of rates, supposing the tenement to be such as described by 6 *Geo.* 4, continues, notwithstanding the 1 *Will.* 4.

WILLIAMS J.—I am of the same opinion. It must be admitted that there is no repeal of settlement by rating; and indeed, in the statute of 6 *Geo.* 4, it is treated expressly as an existing head of settlement.

Supposing the 1 *Will.* 4, c. 18, had not passed, there is no question but that, consistently with the decisions on 6 *Geo.* 4, the tenement here held would have been sufficient to have conferred a settlement by renting a tenement, and would have been sufficient also to have conferred a settlement by rating in respect of that tenement.

Then it is said that this Court contravened the intention of the legislature, in their construction of the 6 *Geo.* 4,—and, in order to obviate that, the 1 *Will.* 4, c. 18, was passed. That act, mentioning the defect which existed in the law upon the construction of the 6 *Geo.* 4, recites the mode of settlement by renting and paying rates, but in the enacting part it leaves the latter utterly untouched, and makes provisions for the former only.

Whatever the legislature meant, (and I agree with my lord—I dare say they thought they had stifled altogether settlement by rating,) I do not think they have carried their purpose into effect.

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COLERIDGE J.—I am of opinion the order of sessions is perfectly right in this case, which seems to me, I must say, a very clear one. The head of settlement by rating was given affirmatively by the 3 *W. & M.* c. 11, s. 6.

Passing over the intermediate statute, that head was restrained by the 6 *Geo.* 4, and on the passing of that act of parliament no one was to be allowed to acquire a settlement under the 3 *W. & M.*, unless he complied with the regulations of the 6 *Geo.* 4. It is said now that that statute must be taken to annul the head of settlement by rating altogether. That is precisely the argument that was used unsuccessfully with regard to the 35 *Geo.* 3 (a). And it was afterwards contended, in *The King v. Penryn* (b), that because a renting of 10*l.* would give a settlement without the rating, that therefore the head of rating was abolished. That is precisely the argument urged to-day; that argument was then urged unsuccessfully; and so it must in common sense be held unsuccessful now. But Mr. Crowder goes on to say, if that be not so, still, from the intention of the 1 *Will.* 4, c. 18, it must be taken at all events, that no such settlement can be gained, unless the parties have complied with all the requisitions of the 1 *Will.* 4. That would be to make us put the same interpretation on an act of the legislature, in which they have recited both grievances, and have chosen to leave the latter wholly untouched.

Order of Sessions confirmed.

(a) See *Res v. St. Pancras*, 3 D. (b) 1 N. & M. 74; 4 B. & Ad. & R. 343; 2 B. & C. 122. 234.

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January 25th.

THE KING v. THE INHABITANTS OF WALTHAMSTOW.

The children
(within the
age of nur-
ture) of a
wife married
to a second

husband, cannot be removed by an order of justices with the husband, although the 4 & 5 *Will.* 4, c. 76, s. 57, enacts that such children shall, for the purposes of the act, be deemed a part of such husband's family.

UPON an appeal against the order of removal hereinafter set forth, the sessions confirmed the said order absolutely as to *William Hammond*, *Eliza* his wife, and *Mary Ann*,


their lawful child, but quashed such order as to the three other children of the said *Eliza*, in the said order named, by her former husband; namely, *Sarah* aged seven years, or thereabouts, *Thomas* aged six years, or thereabouts, and *James* aged four years, or thereabouts, subject to the opinion of this Court on the case hereinafter stated. The said order of removal directed to the overseers of the poor of the parish of St. Leonard, Shoreditch, after reciting that complaint had been made that *W. Hammond* and *Eliza* his wife, and their lawful child, named *Mary Ann*, aged three months, or thereabouts, and also three other children, namely, *Sarah* aged seven years, or thereabouts, *Thomas* aged six years, or thereabouts, and *James* aged four years, or thereabouts, which the said *E. Hammond* had by her former husband, had come to inhabit in the parish of Walthamstow, not having gained a legal settlement there, nor having produced a certificate acknowledging them to be settled elsewhere; and having become chargeable, proceeded to adjudge the place of legal settlement of the said *W. Hammond*, *Eliza* his wife, and the children aforesaid, to be in the said parish of St. Leonard, Shoreditch, and to order the overseers of the last-mentioned parish to remove the said *W. Hammond*, *Eliza* his wife, and the children aforesaid, from Walthamstow to St. Leonard's.

The pauper, *W. Hammond*, was married to the said *Eliza* his wife, on the 28th day of September, 1834, and his settlement at that time, and from thence up to and at the time of the above order of removal, was in the said parish of St. Leonard, Shoreditch. At the time of the marriage of the pauper and his said wife, she had by a former husband, who was not settled in either of the said parishes, the said three children named in the said order of removal, and of the ages therein stated, and all of whom were unemancipated.

The question for the consideration of the Court is, whether, reference being had to the 4 & 5 Will. 4, c. 76, s. 57, the said three children of the said *E. Hammond*, by her said former husband, were removable to the said parish of

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 v.
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 STOW,

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St. Leonard, Shoreditch, under and by virtue of the said order of removal.

If the Court shall decide that the said three children were so removable, the order of sessions, so far as relates to the said three children, is to be quashed, otherwise to be confirmed.

Cripps in support of the order of sessions. The 57th sect. of the New Poor Law Act(a) throws upon the husband the burthen of supporting the children of his wife born before marriage, and it enacts, "that such child or children shall, for the purposes of this act, be deemed a part of such husband's family accordingly." But it does not change the settlement of such children, or give the justices the power of removing them to the husband's parish. Where the act intended to change the settlement of a pauper, it does so in terms as in sect. 71, which not only says that the mother of a bastard child, so long as she is unmarried, shall support it as part of her family, but enacts expressly, that a bastard born after the passing of the act, shall have and follow the settlement of the mother till it shall attain the age of sixteen, or acquire a settlement in its own right. [*Coleridge J.* Where is the settlement of an illegitimate child at the age of sixteen?] Perhaps it would revert to the place of its birth; this section of the act has received a judicial interpretation in *Lang v. Spicer*(b), but it is not necessary to contend that such children are altogether irremovable; it is sufficient to show that the justices had no power to remove them to a parish in which they were not settled. It is true that these children could not be separated from their mother, because they are within the age of nurture, and perhaps they might have been removed to the husband's parish conditionally, till they attained the age of sixteen, or till the mother's death(c). But this order adjudicates that these children are settled absolutely in Waltham-

(a) 4 & 5 W. 4, c. 76.

(b) 1 Moo. & Wels. 129.

(c) *Quære*, whether a conditional

order could be made. See *Oakham v. Whittlesea*, 11 Mod. 171.


stow. If such a construction is to be given to the act, the parish officers of A., in which a female pauper is settled with a number of children, may give a bonus to a pauper settled in B. to marry her, and thus rid themselves of their obligation. (He was then stopped by the Court.)

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Ryland and *C. R. Turner* contrâ. The question sent by the sessions to this Court is, whether the three children of the wife, by her former husband, are removable to the second husband's parish. The order adjudicates them to be settled in that parish, but that does not necessarily mean settled absolutely, it means settled at the date of the order of removal under the provision of the act, and for the limited period mentioned in the act, namely, until the children arrive at the age of sixteen years, or until the death of the mother. [Lord *Denman* C.J. Suppose that order had been confirmed on appeal, how would the parish of Walthamstow ever have been able to get rid of their obligation to support these children? and again, what power have the justices to remove, except on the ground of the settlement being in another parish?] The act by necessary implication confers a new settlement on the children in Walthamstow for a limited period. When the children arrive at the age of sixteen, or if their mother dies, the original settlement of the children would come into existence. It must be inferred that the justices have the power to carry sect. 57, into effect. That clause throws the burthen of supporting children born before marriage, upon the husband; the policy of the statute in that respect was, not to allow the children of the mother to be separated from her, which was always the principle of law^(a); if, therefore, the husband and his wife are removable, the justices must order the children to be removed with them. Some difficulties may possibly arise in getting rid of the effect of such an order, but these are not to be anticipated so as to avoid giving effect to the provisions of the act. If the children are not removable with their mother to the husband's parish, to what parish are they

(a) 2 Nol. P. L. 155.

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 STOW.

to be sent? or how can the law be executed which disallows the separation of mother and child? The difference of language in sect. 71, specifying in terms that a bastard shall follow the settlement of its mother, may be accounted for, for if it had merely said that the mother should support it as part of her family, there would have been a *casus omissus*, as the mother of a bastard may be unemancipated, and consequently have no family.

LORD DENMAN C. J.—Justices have no power to remove paupers unless they are settled in another parish; but it is argued, that as children within the age of nurture are not to be separated from their mother, and are to be supported by the husband under the 57th section of the Poor Law Amendment Act, it follows, that if the husband is removable, the children are to be removed likewise. I do not think that consequence springs from the provisions of the act. It may be assumed that the children will not be separated from their parents, but I do not think the justices have any power to remove them to a parish in which they are not settled.

WILLIAMS J.—In sect. 71, an express provision is contained as to the settlement of a bastard child, and the argument to be derived from that section, which is *in pari materiâ*, is strong to shew, that settlement not being mentioned in sect. 57, was not intended to be affected. The order of the justices in this case adjudicates upon the settlement of these children, and I do not think that the difficulty suggested by my lord as to the future effect of that order has been satisfactorily answered. If such an order is only to be valid for the settlement of the children for a certain time, that must be by the construction of sect. 57, but that clause contains no such provisions, and I cannot make the inference that such is the construction, there being no terms to warrant it.

COLERIDGE J.—The Court is called upon here to say whether the children of a woman (legitimate or illegitimate)

being within the age of nurture, gain a settlement upon the marriage of their mother. Now the words of the 57th section do not mean to say that such a conclusion might not have been borne out by the words of the statute. But as the words do not necessarily import it, and it is only an inference that may under certain circumstances be raised, I ask myself whether I must not look at all the consequences arising from such an inference, and see whether there is any thing that forces the Court to go beyond the literal interpretation of the act. I see nothing to throw such an obligation upon us, but, on the contrary, great inconvenience and novelties introduced into the law of settlement. Whereas adhering to the words of the act seems quite consistent with the purposes for which this enactment was passed, viz. not so much to keep the mother and children together, as to throw upon a husband all the expenses of supporting the children of the woman whom he may marry. These purposes may be effected by making him liable to support the children till they attain the age of sixteen, who for such purposes are to be deemed a part of his family; and nothing else need be implied. The 71st section corroborates this view, because there on a similar subject the legislature has expressly enacted what the settlement of an illegitimate child shall be. As there is nothing to the same effect in sect. 57, I do not think we ought to give the clause a similar interpretation.

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 v.
 Inhabitants of
 WALTHAM-
 STOW.

Order of Sessions quashed.



1837.

Friday,
January 21. A.

The KING v. The Mayor, Aldermen, and Burgesses of the
Borough of BRIDGEWATER.

1. In the borough of B. the common clerk exercised the functions of clerk to the justices. The same person had always filled both places. On the passing of the 5 & 6 Will. 4, c. 76, the common clerk was appointed town clerk, but the provisions of the act prevented the town clerk from acting as clerk to the justices:—Held, that he was entitled to compensation, under sect. 60, for the loss of an office under the provisions of the act.

2. When the Lords of the Treasury make an order on the town council of a borough to grant compensation to a party, and the town council neglect to comply with the order, the Court of K. B. will enforce it by mandamus.

3. The word "office" in the 5 & 6 Will. 4, c. 76, s. 66, is used in a popular sense, and does not mean an office in its strict legal sense.

SIR *W. W. Follett* had obtained a rule in this term, calling upon the mayor, aldermen, and burgesses of Bridgewater, to shew cause why a writ of mandamus should not issue, directed to them, commanding them to prepare and execute a bond under the common seal of the said borough, conditioned for the payment to *J. Trevor*, of the yearly sum of 101*l.* 12*s.* 4*d.*, and to deliver the bond so executed to the said *J. Trevor*.

Mr. Trevor's affidavit, upon which this rule was obtained, stated that he had been appointed common clerk, prothonotary, and clerk of the peace of Bridgewater, in 1833, and that the office of clerk to the justices of the borough, was incident and appurtenant to the office of common clerk, and had been usually held in conjunction therewith. He continued to hold these offices till December 26, 1835, when a new council was appointed, under 5 & 6 Will. 4, c. 76, and on the 1st January, 1836, *Trevor* was appointed town clerk. On the 15th February following, a separate commission of the peace having been granted to Bridgewater, the justices appointed *Mr. Loribond* to be clerk to the justices. On the 27th February following *Mr. Trevor* delivered to the town council a claim for compensation for the loss of his office as clerk to the justices, in which he stated that his average annual profits for the last three years, as clerk to the justices, amounted to 152*l.* 8*s.* 8*d.*, and he claimed the sum of 192*l.* 13*s.*, being the amount required to purchase a permanent annuity of 101*l.* 12*s.* 4*d.*

The town council, after taking the claim into consideration, came to a resolution that *Mr. Trevor's* claim should be disallowed, on the ground that the office of clerk to the justices was not an office of the borough or town; that

5 & 6 Will. 4, c. 76, s. 66, is used in a popular sense, and does not mean an office in its strict legal sense.

Mr. *Trevor* never had been appointed to such an office; and even if there had been an appointment, that he had no legal claim to the office, which was only held during pleasure. On the 13th August following, Mr. *Trevor* memorialized the Lords of the Treasury, under the provisions of the 5 & 6 *Will.* 4, who made the following order:

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" We the undersigned, being three of the Lords Commissioners of his Majesty's Treasury, having, in pursuance and under the authority of the act passed in the fifth and sixth years of the reign of his present Majesty, intituled, " An Act for the Regulation of Municipal Corporations in England and Wales," considered the appeal of Mr. *John Trevor* against the determination of the council of the borough of Bridgewater, on his claim to compensation for the salary, fees, or emoluments of his office, as clerk to the justices of the said borough; and having had regard to the manner of his appointment of the said office, and his term and interest therein, and all other circumstances of the case, do hereby, in pursuance and under the authority of the said act, order and determine that the said *John Trevor* is entitled to the sum of 101*l.* 12*s.* 4*d.* per annum, for his life, as compensation for the salary, fees or emoluments of the said office. Given under our hands this 17th day of October, 1836.

Order of Lords
 of Treasury.

" *R. Stewart, J. Parker, Seymour.*"

Mr. *Trevor* thereupon applied to the town council for a bond, under the corporate seal, to secure the annuity ordered him by the Lords of the Treasury, in pursuance of the 67th section of 5 & 6 *Will.* 4, c. 76, but he was informed that the town council, (under the advice of counsel that the Lords of the Treasury had exceeded their jurisdiction in making the above order,) had memorialized their Lordships to rescind the order. In answer to the memorial of the town council, the Lords of the Treasury made the following order, addressed to the mayor of Bridgewater:

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“Treasury Chambers, 22d Dec. 1836.

“Sir,—The Lords Commissioners of his Majesty's Treasury having had under consideration the memorial of the town council of the borough of Bridgewater, dated the 6th instant, praying that the order of this board for payment of compensation to Mr. *John Trevor*, late clerk of the justices of that borough, for loss of the said office, may be rescinded, I have it in command to acquaint you, that Mr. *Trevor* having been deprived of his office by the operation of the Municipal Corporation Bill, my Lords consider that he is entitled to compensation, and that the fact stated by the town council is not material (a).

“I am, sir, your obedient servant,

“*A. Spearman.*”

(a) In the Treasury Minute of Oct. 7, 1836, which the Lords of the Treasury directed to be sent down to the town council of Bridgewater, their Lordships stated the main question of the town council and Mr. *Trevor's* claim; and their answer to it, in these terms:

“The town council state that it is correct that Mr. *Trevor* was appointed common clerk, but that, as far as they have been able to discover, they have reason to believe he never was appointed clerk to the justices; that the office of clerk to the justices was not a corporate office, made by the corporation in their corporate capacity, but by the justices of the borough as magistrates; that the same was held entirely at the will of the magistrates, removable at pleasure; and they contend that it was the intention of the legislature to afford compensation in respect of freehold offices alone, in which the parties held a life interest and an indefeasible title, and to corporate officers holding corporate offices

alone, and not in respect of offices to which the parties were appointed by persons acting in a capacity altogether distinct and separate from that of their powers and authority as corporators.

“My Lords cannot assent to the construction thus put upon the intentions of the legislature.

“In the reasons of the House of Commons for dissenting from the amendments made by the Lords, proposing to continue the existing town clerks for life, it is stated, that a just and liberal construction cannot fail to be given to the compensation clause, as proposed by the House of Commons. Upon this understanding the House of Lords ceased to persist in their amendments to the compensation clauses, and my Lords, in conformity with this understanding, and the declaration made by his Majesty's ministers in their places in parliament, recorded their opinion previously to the passing of the forecited act, that in the adjudication upon the claims of town

At a town council held on 2d January, 1837, the mayor stated he had called a meeting of the council, relative to the prosecutor's demand for a bond, and upon the above order being read, he asked if any gentleman was prepared to make any motion on the subject; but no motion was made, and Mr. *Trevor's* affidavit concluded by stating that the town council had not yet executed any bond to him as aforesaid.

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Sir *J. Campbell A. G.* and *Erle* now shewed cause. It is only where a person is made out to hold an office, that the Lords of the Treasury have jurisdiction and power to award compensation. If *Trevor* be not an officer, they had no jurisdiction, and their act is void. It is clear from *Rex v. Jotham (a)*, that this Court will not interfere by mandamus, unless there be a clear legal right. *Trevor* did not hold an office within the meaning of the 66th section of the Municipal Reform Act. The person who is clerk to a

First point :
 The Lords of
 the Treasury
 no jurisdiction,
 as the appli-
 cant did not
 hold an office.

clerks, my Lords would not confine compensation to those only who held their offices for life, and would consider not only the emoluments they might receive as town clerks, but those which might be derived from the performance of legal business of the several corporations, executed by town clerks in their official capacity, and the just emoluments of any other corporate appointment held by such town clerks, and usually held in conjunction with, or attached or annexed to, the office of town clerk.

"In this case, it appears that the mayor, recorder and aldermen, were justices by virtue of the charter; that Mr. *Trevor* was, by virtue of the charter, appointed common clerk of the borough, and he and his predecessors in the office of common clerk acted as clerk to the justices; that he held the office of common clerk during good be-

haviour; that no instance is stated when the office of common clerk and that of clerk to the justices were disunited, or where a justice's clerk had been dismissed or deprived of his office.

"Under these circumstances, my Lords are clearly of opinion that Mr. *Trevor* is fairly entitled to compensation for the loss of his office of clerk to the justices, and had a just expectation that such office would be continued to him for life; and in conformity with the principles laid down in their minute before adverted to, my Lords having regard to the manner of his appointment, and his term or interest therein, and all other circumstances of the case, are pleased to order that the annual sum of 10*l.* 12*s.* 4*d.* be paid to him as a compensation for the loss of his office of clerk to the justices."

(a) 3 T. R. 575.

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magistrate fills no office. An assize will lie for an office. An action for money had and received will lie for the fees of an office. A mandamus will issue to restore a party to an office. But those proceedings have never taken place with regard to the clerkship to magistrates. In *Ex parte Sandys (a)*, it was expressly held, that a magistrate's clerk has no permanent interest in his situation, and that if he be dismissed without cause, no mandamus lies to restore him. Any magistrate has a right to appoint a clerk. By the 65th section of the 5 & 6 Will. 4, c. 76, (Municipal Corporation Act,) power is given to the town council to appoint certain officers of a borough. The 66th section is to be construed with reference to the previous section, and it was intended that no one should be entitled to compensation, unless the office should be abolished under the act, or the party be removed by the council. The clerkship to the magistrates has not been abolished, but the council would not appoint Mr. *Trevor* to it under section 102, as he was appointed town clerk, and the two offices are not compatible.

Second point:
The office not
a corporate
office.

But even assuming that Mr. *Trevor* held an office, it was not an office of the corporation, as he was appointed by the justices and not by the corporation. By the 102nd section, a new office of clerk to the magistrates is created. Each magistrate in a borough cannot now appoint a separate clerk, but he might have done so formerly. Therefore, although the office of clerk to the magistrates is now a corporate office, it was not formerly.

If the Lords of the Treasury had no jurisdiction, the whole proceeding is void, and the Court will not issue a mandamus to enforce the authority of a Court in a matter in which it has exceeded its jurisdiction.

First point:
Order of Lords
of Treasury
final.

Sir *W. W. Follett* and *Jardine* contrâ. The whole jurisdiction in cases of this sort is vested in the Lords of the Treasury, and there is no appeal from their decision. They have decided upon the evidence laid before them, and that evidence is not before the Court. Even if this Court

(a) 1 N. & M. 591.

should be of opinion that the facts did not warrant the Treasury in making this order, still that would not take away their jurisdiction, or give an appeal to the Court of King's Bench. Section 66, of the act clearly intends to make the order of the Lords of the Treasury final; the words are, "such order, signed by three or more of the Lords Commissioners, shall be binding on all parties." Even if the lords had decided on a case of this kind, that a certain office was held for life, and had decreed compensation accordingly, and it should turn out, on minute investigation, not to be an office for life, this Court would have no power to interfere.

But Mr. *Trevor* is clearly entitled to compensation. His original office was that of common clerk to the borough of Bridgewater; to that office the clerkship to the justices was appurtenant. In most boroughs the two offices were united, and it is doubtful whether the borough magistrates had power to appoint a separate officer. In counties, the usage has prevailed to make a formal appointment of clerk to the magistrates, but no analogous custom is to be found in boroughs. It has been contended, that no one is entitled to compensation under section 66, unless the office has been abolished by the council, or unless the party be removed from his office, and that here Mr. *Trevor* has been re-appointed town clerk. But Mr. *Trevor* was common clerk; he has not been re-appointed to the same office, and he is entitled to compensation for the emoluments of the other parts of his office which have not been renewed to him. Then section 102 is referred to, to shew that as Mr. *Trevor* could not be re-appointed clerk to the magistrates, he has no title to compensation; but that is an additional claim, as it brings him expressly within the words of section 66, as one who has been removed from his office under the provisions of this act.

It is then said that the situation of clerk to the justices is not an office within the meaning of section 66; it is not, perhaps, an office in the strict common law sense

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Second point:
 The clerkship
 to the magis-
 trates an office
 entitled to
 compensation.

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of the word, but the context shews plainly, that the word is used popularly and to express an office *quodam modo*. In section 102, the very term occurs, applied to the clerkship to the justices, "as often as there shall be a vacancy in the said *office* of clerk to the justices;" and that section enacted, that the justices should not *continue*, as such clerk to the justices, the clerk of the peace, clearly recognizing that in some boroughs the two offices were filled by the same person.

Second point.

Lord DENMAN C. J.—This is an application by a person filling the office of town clerk, or rather who filled the office of common clerk in the borough of Bridgewater, to compel the mayor and town council to affix the corporate seal to a bond which he has presented to them, in pursuance of an order of the Lords of the Treasury. It is quite clear that we are not to put a strict construction on the word 'office' used in the 66th section, and the question is, whether this person has been deprived of an office intended to be compensated by the act of parliament. (His lordship then read the statement of claim in Mr. *Trevor's* affidavit.) That claim was disallowed by the town council, and on the matter being referred to the Lords of the Treasury, their lordships thought Mr. *Trevor* was entitled to compensation, and made an order accordingly. I am of opinion also, that he was so entitled, and that the Lords of the Treasury had jurisdiction to decide upon the question. It is true that the office for which he seeks compensation was incident to the town-clerkship, and that he has been re-appointed town-clerk, but the act of parliament interposes to separate these two offices, and therefore I think his case is brought within the words of the act, and that he has lost an office under the provisions of the act, for which the Lords of the Treasury had jurisdiction to order him compensation. I do not say their lordships would have jurisdiction to order compensation to be made in a case where this Court saw clearly that the office in question was not an office in the borough; but I think, by a fair construction

First point.

of the act, this is an office contemplated by its provisions.

1857.

The KING
v.
The MAYOR,
&c. of
BRIDGEWATER
Second point.

WILLIAMS J.—I am of the same opinion. I do not think that the word ‘office’ was intended to be used in the strict legal sense, for in the section directing compensation to be made to any one removed from an office of profit, it orders, that with the claim to compensation a statement of fees shall be made out, distinguishing the office, place, situation, employment, or appointment in respect of which the same shall have been received, which clearly denotes that compensation was to be made for fees or perquisites received under any of the general terms there used. All that remains then is, to see whether this gentleman received fees or perquisites, in his character of common clerk, of which he has been deprived by the operation of the act; of that there is no doubt, and no attempt has been made to deny it. The Lords of the Treasury, therefore, had jurisdiction to make the order.

COLERIDGE J.—The Attorney General was quite right to base his argument on the ground that this order of the Lords of the Treasury was a nullity, for if it be not a nullity, it clearly must be binding and final on the parties. If the order were a nullity, I should hesitate in saying that the Lords of the Treasury could give themselves jurisdiction. It seems a condition precedent to their jurisdiction attaching, that the person claiming compensation should be an officer within the borough; but it is unnecessary to go into that question, for it appears to me that Mr. *Trevor*’s case is strictly within section 66, of the act. Before the act passed, he was an officer of the borough without doubt; the office he held then, has been abolished, and he has been appointed to an office of a totally different description. Suppose he had not been appointed town-clerk under the new act, in his claim for compensation he would have been entitled to insert the fees and perquisites he had received as clerk to the justices, as well as the emoluments he received in other characters; then what difference can

First point.

Second point.

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it make that he has been re-appointed to a part of his old office, except to lessen *pro tanto* the amount of compensation to which he is entitled.

Again, I quite agree with the rest of the Court in the view they have taken of the word 'office,' and the clause my brother *Williams* has pointed out in section 66, leaves no doubt that a popular extended meaning was intended to be given to the word, and not that which is to be found in law treatises.

In either mode of viewing the case, the order of the Lords of the Treasury must be sustained.

Rule absolute.

The KING v. The Mayor, Aldermen, and Burgesses of
OXFORD.

Saturday,
January 28th.

If a party has been ousted of an office by the election of another person to that office (the election not being merely colourable) his remedy is not by mandamus, but by an information in the nature of a quo warranto.

BINGHAM in this term had obtained a rule nisi for a mandamus to the mayor, aldermen, and burgesses of the city and borough of Oxford, commanding them to restore *John Towle* into the place and office of a councillor of the said city and borough.

It appeared, by the affidavits in support of the rule, that *Mr. Towle* was elected a town councillor for the South Ward of the city of Oxford in January, 1836; that he subscribed a declaration of his acceptance of the office, and of his being duly qualified to fill it, and acted in the office from time to time. At the time of his election it appeared that he possessed all the qualifications required by s. 28, of 5 & 6 Will. 4, c. 76; and he was entitled to remain in office till November 1st, 1837; but that by a notice on the church door of St. Mary's, Oxford, dated October 28th, 1836, the mayor declared *Towle's* office as councillor to be vacant; and by a handbill signed by the mayor on the 2d November, 1836, *Thomas Dry* was declared to be elected in *Towle's* place. It was also sworn that *Towle* had not become disqualified in any of the ways pointed out by s. 52, and that the council had not declared his seat vacant or the office void. *Towle* also stated that he attended a meeting of council on the 9th

November last, as councillor of the South Ward, but the late mayor refused to permit him to speak or to take any part in the proceedings; and afterwards, on the same day, (which was the day of the mayor's election) the present mayor refused to allow him to exercise his functions as councillor.

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 v.
 The Mayor,
 &c. of
 Oxford.

The affidavit of the town clerk, in opposition to the rule, stated, that on the 6th of September, 1836, he received from the respective persons in the city of Oxford thereto appointed, the burgess lists, which he delivered to be printed, according to the 15th section of the Municipal Corporation Act, and the printed copies were brought to him on the 10th, on which he caused a burgess list of each parish to be fixed on the door of the Town Hall, where it remained till long after the 15th instant; and that the name of *John Towle* was not on any of the lists so received by him, and that *Towle* never made any application to the town clerk to inspect the lists, or gave any notice of the omission, or made any claim.

The affidavit of *W. H. Butler*, Esq. late mayor of Oxford, stated, that on 4th October, 1836, a Court was holden before the deponent, as mayor, and *A. & B.* the two assessors, for the purpose of revising the burgess lists, at which Court no application was made on behalf of the said *John Towle* to have his name inserted in the lists, nor was the attention of the Court called to the fact of his name being omitted. That on the 28th October, the attention of the deponent being called to the fact of *Towle's* name not appearing in the burgess lists, he carefully examined the revised lists, and found the name was not in any one of them, and thereupon being advised that *Towle* had ceased to be a councillor by reason of his not being on the burgess roll, and that such vacancy not being within the causes specified by the 52nd section of the Municipal Corporation Act, which would require the council forthwith to declare the office void, he gave the notice mentioned in *Towle's* affidavit, and that at the annual election for town councillors on 1st November, 1836, *Thomas Dry* was elected a councillor in the place of *Towle*.

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OXFORD.

The affidavit of the present mayor stated, that he was elected on the 1st November last, and that on taking such office he found the council complete in its numbers, namely, ten aldermen and thirty councillors, and that the name of *John Towle* did not appear as a councillor for any ward in the city or borough, and submitted that he had not the power to allow *Towle* to act as a councillor or to take any part in the proceedings at any of the meetings of the council.

Sir *J. Campbell* A. G. and *Amos* shewed cause against the rule.

First point:
The omission
of a council-
lor's name
from burgess
list vacates his
office.

I. In this case Mr. *Towle's* name was not inserted, probably through inadvertence, on the annual burgess roll. When the omission was discovered, it was the duty of the mayor to give notice of it and to require Mr. *Towle's* office as councillor to be filled up at the annual election. [*Coleridge* J. Was the office declared to be void by the Town Council?] It was not; that is required in certain cases by section 52, but not in a case like the present, which amounts to a vacancy *ipso facto*, and therefore requires no notice to be taken of it by the council. It is clear from sections 28 & 29, that a person ceasing to be on the burgess list has nothing to do with the borough; and although it may be contended that *Towle* is entitled to be on the list, the test of being so entitled is, whether the name is found there or not. This was the intention of the legislature in providing for the revision of lists, in order to obviate all questions as to what names ought or ought not to be on the roll. If Mr. *Towle* is entitled to be on the roll, he should have put in his claim on the revision of the lists. He has precluded himself now from obtaining this writ by his own laches, because *vigilantibus non dormientibus leges subserviunt*.

Second point:
Mandamus ap-
plied for
against wrong
parties.

II. The mandamus applied for commands the mayor, aldermen, and burgesses to restore Mr. *Towle* to his office; but there is no complaint against the council, it is therefore brought against wrong parties. [*Coleridge* J. If the mayor

alone could not restore him, that would be an answer to your objection.] The mayor could not restore him, because he has not been displaced, all that the mayor has done is to refuse to hear him, for which, perhaps, an action would lie, and perhaps a mandamus to take his vote.

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III. The proper course however would have been, to apply for a quo warranto information, in order to raise the question whether he is entitled to be on the roll or not. For the office is full; Mr. *Dry* has been elected, and is acting as councillor at the present moment. Whether he is exercising the office rightly or wrongly, he is an officer *de facto*, and the Court will not require another to be put into the same office, (*Rex v. Beedle (a)*, *Rex v. Mayor of Colchester (b)*), as there is another remedy by quo warranto.

Third point:
Mandamus
does not lie
to elect where
the office is
full.

Bingham contra. Mr. *Towle* has not been guilty of laches, as the burgess lists, which by the act of parliament (c) ought to have been published by the town clerk eight days before the 5th September, are stated on affidavit to have been in the printer's hands on the 12th September. Mr. *Towle*, therefore, had not an opportunity to put in his claim before the 15th September. The argument of the attorney-general is astounding, that the test of being entitled to be on the burgess list is the fact of being on the roll. If such an argument can be relied upon, how could an ejectment be ever brought? The 6 & 7 Will. 4, c. 104, s. 7, which enacts, that no person inrolled on the burgess-roll shall be liable to penalties for acting as mayor, &c. on the ground that he was not entitled to be on the roll, shews that to be, and to be entitled to be, on the burgess roll, are not identical. *Towle* is clearly entitled to the writ of mandamus, for it is admitted that he was fully qualified as councillor under section 28 (c); he has not been disqualified by any of the modes mentioned in section 52, and the time for which he was elected has not yet expired. He has, therefore, never ceased to be a coun-

First point.

(a) 3 A. & E. 467.

(c) 5 & 6 Will. 4, c. 76, s. 15, 17.

(b) 2 T. R. 259.

1837.

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Oxford.

cillor. If it was intended that the being omitted on the burgess roll should form a subject of disqualification, it would have been mentioned in section 52; its not being so mentioned, shews that the ignorance or heedlessness of overseers was not intended to operate so as to inflict such a heavy penalty. Section 53, which imposes penalties on persons acting as councillors, after they shall have become disqualified, provides that they shall be sued for the offence within three months, and therefore clearly contemplates that certain disqualifications shall not vacate the office. But it is said that this mandamus is improperly directed. The mayor and town council represent the corporation, and are their agents; and as they have refused to let *Towle* take part in the proceedings, the writ is properly addressed to them. If not directed to the corporation, to whom should it be addressed? There are numerous authorities from the year-books downwards to show that this is properly addressed. *Taylor et Civitas Glocester* (a). [Coleridge J. What presses on my mind is, whether a mandamus is the proper remedy.] The cases cited on this point only shew that an information in the nature of a quo warranto might be issued.

Second point.

Third point.

WILLIAMS J. (b)—It is not necessary to enter into any discussion on the meaning of the words used in the 28th section, "who shall not be entitled to be on the burgess-list of such borough," because it is assumed that Mr. *Towle* is in the office, and never was dispossessed. According to the argument he is an existing councillor; a mandamus, therefore, to restore him to that office is unnecessary.

COLERIDGE J.—I think in this case, when we look at the facts agreed on by both parties, this remedy of a mandamus is wholly or in part unnecessary. If it is to be taken that the whole proceedings relative to Mr. *Dry* are a nullity, that

(a) 1 Roll. Rep. 409.

(b) Lord Denman C. J. was attending his Majesty at Brighton, Littledale J. was absent from the Bail Court on account of indisposition, and Patteson J. was sitting in the Bail Court.

his election was merely colourable and void, then undoubtedly, according to *Rex v. Colchester* (a), a mandamus is the proper remedy. I am not however prepared to say that all that has been done is merely colourable. If it be conceded that the mayor has done so little, that Mr. Towle remains councillor, then a mandamus is an improper remedy. If, on the other hand, that which has been done is not merely colourable and void, but has put Mr. Dry in office, then an information in the nature of a quo warranto is the proper remedy. In *Rex v. Colchester* (a) the doctrine is laid down, that if the party has another remedy by quo warranto, a mandamus will not be issued. In *Rex v. The Mayor of York* (b) there were two candidates for the recordership. The number of votes was equal, the mayor giving the casting vote. One candidate then had the actual majority of votes; the other showed that one of those votes was bad. The one who had the majority of votes had the certificate of the mayor that he was elected. The distinction between that case and this is obvious. In that case the title of both parties was incomplete. *Rex v. The Mayor of York* (b), when explained in this way, is confirmed by *Rex v. Beedle* (c), in which the same doctrine is laid down.

Sir J. Campbell A. G. then applied for the costs, on the ground that as the remedy had been mistaken, the mayor ought not to pay the costs incurred by him in consequence of this mistake, and that the costs could not be paid out of the borough fund.

Bingham contended, that as the mayor had illegally deprived Mr. Towle of his seat in the council, he was not entitled to the favour of the Court.

Rule discharged with costs.

(a) 2 T. R. 259.

(b) 4 T. R. 699.

(c) 3 A. & E. 467.

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Two circumstances must concur to authorize the issuing of a mandamus,—a specific legal right, and the absence of an effectual remedy.

If it be doubtful whether there be a remedy, the Court will issue a mandamus. Where a mandamus has issued in pursuance of a compensation clause in a local act to impanel a jury, and to assess the damages sustained by the party, the Court, upon the discussion of a rule nisi for a mandamus to enforce the payment of the damages assessed, will not allow the legality of the first mandamus to be questioned.

In such a case, the regularity of all proceedings previously to, and at the trial is to be presumed, no objection having been made at the time of the trial.

Quere, can an action of debt be maintained by the party interested, where a local act directs that the verdict of a jury awarding compensation for damage, shall be a record of the Court of Quarter Sessions, but omits to provide any remedy for the recovery of the sum awarded.

The KING v. The NOTTINGHAM OLD WATERWORKS COMPANY.

A Rule had been obtained in this case in last Michaelmas term, by Sir *W. W. Follett*, calling upon the Company to shew cause why a writ of mandamus should not issue directed to them, commanding them forthwith to pay to *Sarah Turner* 500*l.*, being the damages assessed by a jury to the said *Sarah Turner*, for the injury and damage sustained by her in her lands, tenements, hereditaments and premises, by reason of the works done and erected by the said Company, in execution of certain of the powers given to them by a statute of the 7 & 8 *Geo. 4.* for more effectually supplying with water the inhabitants of the town and county of the town of Nottingham, and also the sum of 24*l.* 7*s.* 3*d.*, the costs and charges incurred by the said *S. Turner* in and about the inquiry before the jury.

Mrs. Turner was tenant for life of a water mill on the river Leen, at Lenton, in Nottinghamshire. Before the passing of the 7 & 8 *Geo. 4.* the Company possessed certain works for raising water at a point below *Mrs. Turner's* mill, and had there erected a weir across the river. After the passing of the act, the Company erected their works 100 yards higher up the river, which penned back the water on *Mrs. Turner's* mill, whereby the power, and consequently the value of the mill was greatly diminished. In Michaelmas term, 1836, a mandamus was issued by the Court of King's Bench^(a), commanding the Company to issue a warrant to the sheriff of the county of Nottingham, to summon and return a jury to appear before the justices of the peace at the next sessions for Nottinghamshire, in order that a jury might be then impanelled according to the directions of the 7 & 8 *Geo. 4.* to assess the

(a) See *The King v. The Nottingham Waterworks Company*, 5 N. & M. 498.

damages sustained by *Mrs. Turner*. In pursuance of this mandamus a warrant was issued, but by consent of the parties the day for the return of the mandamus was enlarged till the 20th of April. On the 4th of April, at the sessions, the jury were returned and impanelled, and assessed the damages sustained by *Mrs. Turner* at 500*l*. Application was subsequently made to the Company for payment of this money, and likewise for the costs, amounting to 241*l*. 7*s*. 3*d*., which they refused to pay. An application was made to the quarter sessions of the peace, for a warrant of distress to enforce the payment of the damages and costs. The hearing of this application was adjourned until the following October sessions, when it was refused. A subsequent application was made to an individual magistrate for a distress warrant, but he also refused to grant one. It appeared that when the notice was given to the Company to summon a jury in November 1834, it was given not only on behalf of *Mrs. Turner*, but also on behalf of her children, who are the tenants in tail in remainder of the property, but that a former notice given in the month of May preceding, was given on behalf of *Mrs. Turner* only, and was confined to the damage solely sustained by her. The Company contended at the quarter sessions that the proceedings were void, upon the following amongst other grounds.

1st. That the notice given by *Mrs. Turner* to the Company, on which the writ of mandamus was applied for and granted, was on behalf of *Mrs. Turner* as tenant for life, and of her children as tenants in tail, in the mill. Whereas the inquiry directed by the said writ was confined to a compensation for *Mrs. Turner's* life interest only, and the verdict of the jury was given accordingly.

2nd. That the act for making the said waterworks gave no power to make a partial inquiry into the damage sustained by a person having only a term or limited interest in the property damaged.

3d. That the inquiry ought to have been into the whole

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damage sustained by the estate, or by all persons interested in it, and that the sum assessed by the jury should afterwards have been apportioned or divided amongst such persons, according to the extent of their terms of interest in it. That otherwise legal proceedings might be multiplied indefinitely.

4th. That the compensation clause of the said act, under which the proceedings were taken, did not impose or authorize the payment of any costs.

5th. That no power of distress was given by the act for recovering the damages or costs.

The act of 7 & 8 Geo. 4, after reciting that the inhabitants of Nottingham had long been supplied with water from the river Leen, by means of works constructed at the expense of the proprietors of such works, that through the increase of manufactures &c., the water of the river had become impure, and that it was desirable that Nottingham and some of the neighbouring parishes should be regularly supplied with water from certain springs in the parish of Basford, incorporated the proprietors of the old works for completing &c. the waterworks &c. thereby authorized to be done, constructed &c. by the name of "The Company of Proprietors of the Old Waterworks."

Sect. 2 enacted, "that it should be lawful to and for the Company to enter lands &c., mentioned and specified in the plans and books of reference, and to ascertain and set out such parts thereof as they should think necessary and proper, for continuing, making &c., and using the said waterworks, reservoirs &c."

Sect. 8 empowered the Company to purchase, and bodies politic &c. to sell and convey lands &c.

Sect. 11 enacted "that the owners and occupiers of lands, springs &c., through, in or upon, over or under which the works thereby authorized were or were intended to be made or laid, might receive satisfaction for the value of such land &c., and for the damages to be sustained in making and completing the said works, in such gross sums as might be agreed upon, and in case of disagreement as to the amount or value of such satisfaction the same should be assessed by a jury."

Sect. 12 contained the usual provisions with respect to the summoning to appear before the justices of the peace at quarter sessions, &c. of a jury, who were to give a verdict for the sums to be paid for such lands, &c. to be taken or made use of for the purposes of the act, and also a separate and distinct sum for compensation for damages, which had or should be occasioned to the owners &c. of such lands &c., for or by reason of the severing or dividing the same from other lands &c. belonging to them, or by reason of the making &c. the works, or by reason of the execution of any of the powers given to the Company; and the justices

were to give judgment for such compensation; which verdict and judgment should be binding and conclusive to all intents and purposes.

Sect. 18 enacted, "that in every case where a verdict shall be given by any such jury for more money than shall have been previously offered for or on behalf of the said Company of proprietors as a recompense or satisfaction for any such lands &c., or for any damages that may have been sustained by any person or persons aforesaid, all the costs and charges incurred in summoning, impanelling and returning such jury, taking such inquisition, and the attendance of witnesses, and recording the verdict or judgment thereon, shall be borne by the said Company of proprietors, out of the monies to be raised by virtue of this act; and in case such costs and expenses shall not be paid to the party or person entitled to receive the same within ten days after demand made thereof from the said Company, then the same shall and may be levied and recovered by distress and sale of any goods or chattels vested in the said Company, or of any goods or chattels of the treasurer or treasurers of the said Company, under a warrant to be issued for that purpose by any justice of the peace for the said town or county of Nottingham, which warrant any such justice is hereby authorized and required to issue under his hand and seal, on application made to him for the purpose by the party or person entitled to receive such costs and expenses; and in every case where a verdict by any such jury for no more or for less money than shall have been previously offered by or on behalf of the said Company as such recompense or satisfaction as aforesaid, all the costs and charges incurred as aforesaid shall be borne in equal proportions by the party or parties refusing or neglecting to treat or agree as before mentioned and by the said Company; but in cases where any person or persons, party or parties, shall have been prevented by absence from entering into any treaty with the said Company, the costs and charges so incurred shall be borne by the said Company in manner aforesaid, and in all cases where any difference shall arise touching the amount of the said costs and charges, the same shall be settled and ascertained by any justice of the peace for the said town or county of Nottingham, not interested in the matter in question, who is hereby authorized and required to examine into and settle the same, and to appoint a time and place for payment thereof; and where the costs shall be payable by the party or parties having had any such disagreement or dispute with the said Company as aforesaid, the amount thereof having been first paid by the said Company, may be deducted by them out of the monies awarded to be paid to such party or parties, as so much money advanced for his, her, or their use, and the payment or tender of the balance of such money shall be deemed and taken, to all intents and purposes whatsoever, to be a payment or tender of the whole money awarded and adjudged to such party or parties, otherwise if such costs and charges be not paid upon demand, after being so ascertained as aforesaid, the same may be recovered by the said Company from the party or parties liable to the

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payment thereof, by action of debt or on the case, in any of his majesty's Courts of Record at Westminster, with full costs."

Section 20 enacted, "that if at any time or times hereafter any person or persons shall sustain any damage in his, her, or their lands, tenements, hereditaments, or property, by reason of the execution of any of the powers given by this act, and for which a compensation is not hereinbefore provided, then and in every such case such damages shall from time to time be settled and ascertained, or assessed by a jury, and the sum or sums of money to be paid for the same shall be recovered, *levied*, and applied in such and the same manner as is herein directed with respect to such damages as are hereinbefore provided for, and the money to be paid as a recompence for the same."

Section 15 enacted, "that all the said verdicts and judgments being first signed by the clerk of the peace for the said town or county of Nottingham, shall by such clerk of the peace be registered among the records of the quarter sessions for such town or county, and shall be deemed records to all intents and purposes."

The clause 22, which gave the Company power to enter lands, upon payment of the purchase-money, had, at its conclusion, the following proviso:—"Provided nevertheless, that before such payment, tender &c., it shall not be lawful for the said Company to dig or cut into such lands &c., for the purpose of making the said reservoirs, &c., without the leave of the respective owners &c., in writing, given under their respective hands."

First point:
Mandamus
does not lie to
pay the sum
awarded by a
compensation
jury.

M. D. Hill, N. R. Clarke, and Whitehurst, now shewed cause. Admitting that *Mrs. Turner's* title to compensation has been decided upon by the Court having granted the mandamus (*a*), she is not entitled now to a mandamus to obtain the sum awarded to her, for that is a debt which can be recovered elsewhere. If her claim be a good one, she may bring an action. The doctrine is clearly laid down in the books, that whatever the law orders any one to pay, becomes instantly a debt which may be sued for. Thus Sir *W. Blackstone* (*b*) says, "every person is bound and hath virtually agreed to pay such particular sums of money as are charged on him by the sentence, or assessed by the interpretation of the law." So *Com. Dig.* Action upon Statute (*A 1*), and Lord *Holt* in an *Anonymous* case (*c*), said, "that wherever a statute enacts any thing or prohibits any thing

(a) *Rex v. The Nottingham Old Waterworks Company*, 5 N. & M. 498.

(b) 3 Comm. 158.
(c) 6 Mod. 27.

for the advantage of any person, that person shall have remedy to recover the advantage,—for it would be a fine thing to make a law by which one has a right, but no remedy but in equity.”

In this case the sum having been assessed by the verdict of a jury, impanelled under the authority of the Court of Quarter Sessions, which is a Court of record, and the verdict being expressly directed to be recorded, the sum given may be sued for like any other debt on a judgment. In *The King v. The Bank of England* (a), an application was made for a mandamus to make the Bank transfer some stock; but the Court refused to issue the writ, as an action on the case would lie, which would afford complete satisfaction.

Second, the mandamus requires the costs also of the writ of inquiry, &c. But section 9, which awards costs, gives a remedy for them also, namely, the power to distrain, and therefore the same objection applies: besides, the costs when taxed form a part of the original debt; for it has been held in cases of bankruptcy, where a creditor has obtained a judgment before the bankruptcy, and the costs have been taxed, both the sum recovered and the costs form one debt, proveable under the fiat (b). Here, however, the costs have not been taxed; and the Court cannot issue a mandamus when it is uncertain for what amount it is to be issued.

But supposing it to be quite clear that the writ could issue, the party claiming has not entitled herself to it, for this lady is only the tenant for life; the jury therefore should have assessed the damage done to each party entitled. [*Patteson J.* In *The King v. The St. Katherine's Dock Company* (c), a mandamus issued to the treasurer of the Company to pay the sum found due upon an award, although it was objected that the arbitrator had not adjudicated upon one of the matters in difference.] Still, before the prosecutrix is entitled to a mandamus, she must shew on affida-

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ings irregular.

(a) 2 Dougl. 524.

(c) 1 N. & M. 121; S. C. 4 B.

(b) See Arch. Bankrupt Law, & Ad. 360.

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vit that every thing has been done which is required by the act, in order to give the sessions jurisdiction. It ought to appear in the affidavits of the other side, that notice in writing, required by the act, had been given, and that the verdict had become a record of the sessions. [Patteson J. Is it competent to you to take that objection now? You might have raised any objection to the jurisdiction of the sessions not having attached when the former rule was made absolute.] The only point discussed in the last argument was, whether the party should not be left to the common law remedy. [Coleridge J. Must not we take it that the mandamus issued rightly then, and, if so, the sessions had jurisdiction?] In *Rex v. St. Katherine's Dock Company* (a), on a motion for quashing the return to a mandamus, Parke J. said, "the objection that it (the mandamus) ought not to have issued at all, though it might more properly have been made at the time when cause was shewn against the rule for issuing it, may be made in this stage of the proceeding." But it is not necessary to contend so far, as the mandamus might have been granted properly, but it does not follow that the prosecutrix has done every thing to give the sessions jurisdiction.

If this verdict can be supported, successive claims may be made by tenants in tail and remainder men without number, which would be a great inconvenience, and shews that the Court below can have no jurisdiction without all the claimants appearing (a).

Sir *W. W. Follett* and *Bourne* in support of the rule: Mrs. *Turner* could not bring any action, for the Company are not like a Banking Company. The answer to any action would be, that the act of parliament had given a remedy for the injury she had sustained. It is true that the verdict of the jury is to be recorded, and is to become a record of the Court of Quarter Sessions, but no action could be maintained on such record. The proper and only mode of

(a) 1 N. & M. 121; 4 B. & Ad. 360.

enforcing the judgments and orders of the Court of Quarter Sessions is by indictment for disobedience to them. An action does not lie on a decree of a Court of Equity, surely then it cannot be maintainable on an order of the Court of Quarter Sessions. *Mrs. Turner* complains of injury occasioned by an act which the Company were to do by the act of parliament, and therefore no action lies. In the case of the *St. Katherine's Dock Company*(a), an action had been commenced against the Company, and the statute in that case provided, that an action might be brought against the Company. There a verdict passed against the Company, and judgment was entered up; and the question was, how the payment of the costs was to be enforced. The Court determined there was no remedy given for the costs, and awarded a mandamus to enforce the payment of them. The present is a much stronger case than that, because this is a case of consequential damage, for which the only remedy is under the statute, that was the case of a debt due. [*Patteson* J. Will not an action lie on every judgment of record?] The legislature never could have intended that an action should be brought after the verdict of a jury. It must have been intended that that verdict should conclude the litigation between the parties; at all events it is extremely doubtful that an action could be maintained; and as the party has not an adequate and complete remedy, the Court will issue a mandamus. *The King v. The Severn and Wye Railway Company*(b); *The King v. The Thames and Isis Navigation Company*(c).

Then it is said, that the jury should have assessed the damage done to each party. The mandamus describes *Mrs. Turner* as tenant for life, and the damage done to her as tenant for life has been assessed. [*Hill* objected to any reference to the mandamus, but the Court determined it might be referred to.]

Then it is said, that it does not appear that the judg-

(a) *Corpe v. Glyn*, 3 B. & Ad. 801; S. C. 1 N. & M. 121; 4 B. & Ad. 360. (b) 2 B. & Ald. 646. (c) Not yet reported.

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ment was entered of record, but that is the act of the Court of Quarter Sessions. It is not necessary to state all the facts in the affidavit giving the Court of Quarter Sessions jurisdiction; they are to be presumed.

Then, as to the costs, the act directs costs to be paid. The Court of Quarter Sessions and the magistrates have refused to issue a distress warrant, the party therefore has no means of enforcing the payment of those costs, except by mandamus.

Second point :
 The costs.

PATTESON J. (a)—This is an application for a mandamus to compel the Company to pay the sum awarded by the jury, and the costs. It is quite clear that if we should be of opinion the rule has prayed for too much, in asking for a mandamus both for the damages and the costs, we may grant what part of the rule we think proper. With respect to the costs, this act of parliament directs, that if any person shall sustain any damage by reason of the execution of the powers given by the act, and for which a compensation was not before provided, then the damages should be ascertained by a jury, and the sum to be paid for the same shall be recovered, levied, and applied in such and the same manner as was therein directed with respect to such damages as were sustained in originally making the works of the Company. This clause is silent as to costs, except by reference to the mode in which the purchase-money, and the damages which the person would sustain by his land being taken in the first instance, are to be assessed and determined. There is certainly a clause (sect. 9.) which provides, that if the sum which the jury ultimately give should be greater than the sum offered by the Company, for the purchase of land to make the works, then the Company should pay the costs; and a mode of recovering those costs is expressly pointed out. If the Company refuse to pay after ten days, they are to be recovered by distress and sale under the warrant of a justice. I think either the costs are not recoverable at all in this case, or if they are, they must be

(a) Lord Denman C. J. was at the Privy Council.

recoverable in that manner. We cannot therefore make this rule absolute for a mandamus, so far as regards the costs.

With regard to the damages, I confess I have very great difficulty in saying that this rule for a mandamus should be made absolute. If there is another clear and specific remedy to enforce the payment of them, we ought not to grant this mandamus. I had for some time very great difficulty in saying there was not a remedy, because it is expressly provided by the act, that on the verdict which shall be found by the jury at the sessions, the sessions shall give a judgment; and that such judgment shall be binding and conclusive to all intents and purposes. There is also a subsequent clause, (sect. 15,) which provides that the verdict and judgment, being first signed by the clerk of the peace, shall be registered among the records of the Quarter Sessions, and shall be deemed a record of the sessions to all intents and purposes. It seemed to me at first, that if this verdict was a judgment of record it might be enforced, like any other judgment of a Court of record, either by the process of the particular Court of which it was a record, (if it had any process for the purpose); or if not, by an action of debt in the Courts at Westminster; but upon further consideration, I entertain much doubt, as this proceeding is not an ordinary record of the Court of Quarter Sessions. I certainly never heard of an action of debt being brought on a record of the Quarter Sessions. The fact is, the records of the Quarter Sessions do not ordinarily extend to proceedings of this kind. It is difficult to see how an action could be brought on such a document as a record of these proceedings, nor can I find that there is any mode of enforcing the payment of the damages, provided by the statute. When the provision with respect to the purchase-money,—and the damage sustained by taking land,—which is the principal thing contemplated in this act, are examined, it appears that there is no mode given by which that purchase-money is to be recovered at all. There is to be a verdict and judgment, and then the whole proceedings are to cease, according to the act, if such be the

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will and pleasure of the Company. After having said they will take the land,—after having offered a sum of money for it,—after the parties have refused to take that sum, and have been to the sessions,—and a verdict and judgment has been entered,—there is no mode pointed out for the party to enforce payment of the sum assessed. The only means is the provision in the 22d section, that until that sum is paid the Company shall not be entitled to take possession of the land. I presume it was thought sufficient to enforce the payment of the purchase-money, that the seller should retain his lands unless the money was paid. No provision is made by section 20, as to what is to be done if the parties mutually agree on the sum to be paid for compensation for the injury done, nor is it provided that a demand should be made for the damage, nor that any offer should be made by the Company. The word “*levied*” is inserted. I suppose the legislature took it for granted there was some mode of *levying* what was to be recovered in respect of the purchase of land. If there was any process of the Court of Session by which they could *levy* upon this judgment pronounced by them, I should say no mandamus ought to go from this Court; but I believe there is no such process by which the sessions could *levy*. There is no officer to whom they could direct the process. They have no power to issue a *fieri facias*, a *capias*, or *levari facias*, to enforce a judgment of this sort, and the damages therefore cannot be levied by those means. This judgment cannot be removed into this Court by certiorari, because there is no act which gives us the authority to receive such document and to enforce it; the word “*levied*” is therefore of no use, and has no meaning. The only remaining way, which has been already adverted to, is an action of debt on the judgment, and the main argument on the part of the Company has been to shew it may be so enforced. It is very doubtful. I am by no means prepared to say it could not; but it is not clear that it could. If that be so, according to the ordinary practice of this Court,

if there be not a clear remedy, we are bound to enforce, by writ of mandamus, the performance of what the act has required to be done. This writ, therefore, must go with respect to the sum awarded. There are some other objections which have been taken with respect to the regularity of the proceedings; but I do not understand there are any affidavits made on the part of the Company which shew that the proceedings have been actually irregular, only that it is objected the affidavits on the other side do not distinctly shew every regular step has been taken; as for instance, they do not shew that judgment of the sessions has actually been entered up; and they do not shew a notice in writing was given, stating the particular injury, and the amount of compensation claimed in respect thereof. I do not think we are bound to inquire into these matters; we must take it for granted *omnia esse rite acta*. It has also been said, this lady is tenant for life, and that that is an objection to this finding of the jury, because the jury ought to have been summoned to assess the damages that were sustained, not by the tenant for life only, but by every person interested in the land; and that there should be but one assessment, and that the sum awarded ought to have been separated and divided by the jury, so much for the tenant for life, and so much for the person in remainder. However that might be with respect to the clause which relates to the purchase of the land, when all persons, whether tenants for life or in remainder, must have some interest in the money awarded, it does not of necessity follow, under the 20th section, any body had a right to compensation except the tenant for life, because the injury sustained may be of a temporary nature only. I am not saying whether it was so or not in this case. The words of the section do not expressly extend to all persons having every possible interest in it; it only says "*any person or persons* who sustain any damage in his, her, or their lands, tenements, hereditaments, or property, by reason of the execution of this act, may have a compensation, to

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be assessed by a jury;" and the applicant is a person in possession, a tenant for life, and she says she has sustained a damage in her land; they are her lands at present. The section is therefore strictly complied with. It cannot be objected that more damages were given than the tenant for life was entitled to have, as it should have been distinctly pointed out to the jury at the trial how they were to limit the damages. I do not find that the affidavits shew that any objections were made to the mode in which the chairman of the quarter sessions put the question to the jury; nor that the jury were not told to confine themselves to the interest of the tenant for life; or if they did not confine themselves to the injury of the tenant for life, that they were to distribute the damages they gave to the tenant for life and the persons in remainder; nor that any objection was made as to the notice at the sessions. Under all the circumstances, it seems to me we are bound to make this rule for a mandamus absolute, so far as regards the finding of the jury of the amount of compensation. The costs we must leave to the party to procure as she may be advised. If the justices do not choose to issue a warrant, the complainant must apply in another way. The costs of the other mandamus cannot be included in this. They are to be enforced at law by attachment in the ordinary way. The act of parliament has not given the costs of procuring the mandamus; it cannot be included in the present writ. We direct it only to pay over the sum of money found by the jury on that verdict on which judgment has been given by the quarter sessions.

WILLIAMS, J.—I shall give my judgment in a very few words, agreeing as I do with the judgment of my brother
 Second point. *Patteson*. The question of costs may be disposed of very shortly. There is nothing ascertained and precise with regard to their amount, which ought to be the case before
 Third point. we grant a remedy of this sort. As to the notice, it was proved before the parties began; nothing to the contrary

is shewn, and I think we ought to presume and to intend that all was rightly done. I see nothing wrong in the form of the compensation awarded to the claimant in the case. The principal question has been, whether or not there was another full and efficient remedy. If there had been, we ought, unquestionably, not to grant this writ. A *levy* is not practicable. I know of no case where money is to be paid, by an order of the Court of Quarter Sessions, that it is enforced in any other way than by indictment. Cases of bastardy orders are familiar instances of the kind. There remains the most important question, whether or not, when by a section of an act of parliament a verdict is declared to be treated as a record to all intents and purposes, that is in itself a legislative declaration that there is a remedy by action of debt on that judgment. Considering the Court of which the proceeding is to be a record, that an action on a judgment of that Court is unknown, I do entertain great doubt whether there be an efficient remedy. It seems to me we ought, for the 500*l.*, to allow the writ of mandamus to go; and I own I am somewhat influenced in coming to this decision by reflecting, that it is not probable the legislature would put a party to so circuitous and cumbrous a remedy, as an action, for the recovery of the very thing for which a summary remedy was provided by the act of parliament.

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First point.

COLERIDGE J.—My brother *Patteson* has gone into this case very fully, and I quite agree with him in the reasons he has given; I only wish to add a very few words on one or two points. The principle on which the writ of mandamus goes is very well known: two things must concur; a specific legal right, and the absence of an effectual and efficient remedy for the enforcement of that right. I think, dividing this case, as no doubt we have a right to do, between the damages and costs, and taking the costs last (which are again divisible into two parts, the costs of the former rule and of the former mandamus here, and the costs on the

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Second point.

inquiry at the sessions below), if the principle I have laid down be applied to the costs of the former rule and mandamus, there is clearly an absence of a specific legal right, because, until the Court award the costs of that rule, there is no right to the party to have them. With regard to the costs of the inquiry, I think the same may also be said, because we do not know that there is any right to costs. The act does not appear to have given, by the section to which we are referred, any right to costs at all; here we are not dealing with a common law matter, we are dealing with something entirely the *creature* of this act of parliament; the party must take his rights as he finds them in the act. In the absence of any provision as to costs in the act, I think we are bound to refuse the rule with regard to them.

First point.

With regard to the 500*l.* damages, it must be now taken, after the grant of the mandamus and return of the jury, that the party has a specific legal right to the 500*l.* But has he got a clear remedy in this case—an effectual remedy? The only way this has been contended for has been by saying, either this is a judgment which may be enforced like any other judgments of the Court of Quarter Sessions, or that it is a judgment that may be enforced by an action. Now, with regard to the enforcement of judgments of Courts of Quarter Sessions, it is well known, the only mode of enforcing an ordinary judgment of the Court of Quarter Sessions, is by indictment. That has been held in one case already not to be an equally beneficial remedy. It is clearly not so here; all that would be obtained would be the punishment of the party for disobeying the judgment; they might impose a fine or imprisonment, but the party would have no clear legal right to receive that fine. Therefore it is quite certain that mode of proceeding would not be an equally beneficial remedy. As to the remedy by action, can any one say it is clear and certain an action of debt could be brought on this judgment? We have been referred to general expressions used in *Blackstone's Com-*

mentaries, but nothing like a decision or case in point; and who can doubt, if this action was brought, the objection would be made, and a great deal of argument be brought forward to show that no action would lie in this case.

With regard to the other points, they are really scarcely worth mentioning. We are bound (I say it only with regard to other proceedings) to take for granted, when a mandamus has been issued and no return has been made to it, and the party has consented to obey it, at least in part, that it was properly issued; the party is not afterwards, when another mandamus is sought for ancillary only to the former, and for the purpose of giving full effect to it, to come back and say, "Oh, on a former occasion this mandamus prayed for too little, or for too much, and therefore you ought not now to proceed on that." With regard to the proceedings at the sessions, I think we are bound to presume that the Court below has done all that it ought properly to have done. If the act says the jury are not to award compensation for any damage which has not been specified in the notice previously, unless it is distinctly made out that that notice was not proved, or the notice having been proved, still the jury were allowed to go beyond that, we must give credit to the Court below, that the notice was properly given, and that the jury were instructed in compliance with that notice. I merely put this as an instance. There are other points which I shall not dwell on, because I need only say, I entirely agree with the reasons of my brother *Patteson* in regard to them.

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Third point.

Rule absolute for a mandamus
to pay the damages, 500*l*.

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*Monday,
Nov. 30th.*

James 1 granted a rectory to a corporation in trust to pay stipends, and to bear all the charges issuing out of the rectory. The 22 & 23 Car. 2 abolished the parishioners from the payment of tithe, and enacted that a rate should be made yearly by the parish officers for the payment of stipends, and for church repairs. The 56 Geo. 3, c. 1v. enacted that it might be lawful for the wardens, overseers, and inhabitants in vestry, to make a rate (to a larger amount) for the payment of stipends and for church repairs. On a vestry refusing to make a rate for the above purposes under the last-mentioned act, the Court issued a mandamus to them to call a vestry and make a rate.

The KING v. The Wardens and Overseers of the Poor and Inhabitants of ST. SAVIOUR'S, SOUTHWARK.

BY 32 Hen. 8, after reciting (inter alia) that the monastery of St. Mary Overy, in Southwark, had been dissolved, that the parish church of St. Margaret, in Southwark, was prostrated, and that the parishioners, as well of St. Margaret as of St. Mary Magdalene Overy, repair for divine service to the church of the dissolved monastery, it was enacted, that the said several parishes should be united, and that the church of the dissolved monastery should be the church of the parish, which should be called St. Saviour's, Southwark. It then enacted, that the parishioners of St. Saviour's should yearly nominate six or four able persons, dwelling within the parish, to be churchwardens, who should do and exercise all and every thing as any other wardens in any other parish, should be a corporation with a common seal, and should have and enjoy all the messuages, &c. as at any time were in the possession of the wardens of St. Margaret and St. Mary Magdalene, jointly or severally (a).

By letters-patent in the 9th Jac. 1, his Majesty granted to *John Bingham* and others, of the parish of St. Saviour's, the rectory, tithes, &c. of St. Saviour's, and all the hereditaments &c. late in the tenure of the wardens of St. Saviour's (a), in trust, to maintain a house for a grammar school, and to pay 20*l.* a year to the schoolmaster, and 10*l.* a year to the usher, and to pay 30*l.* a year to each of two chaplains to celebrate divine service, and observe the cure of souls in the parish, and also yearly from time to time to pay all other charges, expenses, and sums of money out of the said rectory, of ancient time issuing or to be paid, and

(a) The act also recited letters-patent of *Hen. 6*, and a previous act of *Hen. 8*, by which a corporation by the name of wardens

was erected in St. Margaret's, with a common seal, and with power to buy lands to a certain yearly value.

the King and his successors therefrom from thenceforth to exonerate and keep harmless.

By the 22d and 23d Car. 2, c. 2, intituled "An Act for making the Manor of Paris Garden a Parish, and to enable the Parishioners of St. Saviour's, Southwark, to raise a Maintenance for Ministers, and for Repairs of their Church," the letters-patent of *James 1*, granting the rectory to *Bingham* and others, in trust for the wardens of St. Saviour's, out of the revenues thereof, to maintain two chaplains, &c., and to repair the church, were recited; and it also enacted that the said church, being very large and chargeable, and the revenues of the rectory only amounting to 100*l.* per annum, were not sufficient to repair the church, and to allow any reasonable maintenance to the chaplains. It then enacted, that all the parishioners, inhabitants, messuages, &c., should be for ever exonerated from tithes, and in consideration thereof it should be lawful for the churchwardens and overseers for the time being, giving notice unto or calling together six or more of such inhabitants as had within the space of seven years then last past borne the like office therein, to meet on Easter Tuesday in every year, and make a rate upon the parishioners, not exceeding 350*l.* per annum; and the wardens of St. Saviour's should pay 100*l.* a year to each of the two chaplains, 20*l.* a year to the schoolmaster, and 10*l.* a year to the usher; and *all the residue of the monies so to be raised as aforesaid, shall from time to time be applied and disposed of for and towards the repairs of the parish church of St. Saviour's.*

The 56 Geo. 3, c. 1*v.* was intituled, "An Act to enlarge the powers of an Act passed in the 22d and 23d years of the reign of his Majesty King *Charles 2*, and to enable the parishioners of St. Saviour's to raise a maintenance for ministers and for repairs of their church, and for other purposes relating thereto." That act, (after reciting the 32 Hen. 8, and 22 & 23 Car. 2, c. 2, and that the sum allowed to be raised by the last-mentioned act, and the revenue of the rectory, under the care of the wardens, were inadequate

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Parish of St. Saviour's made tithe free, and six of the late churchwardens to make a rate every year not exceeding 350*l.*

The wardens to pay chaplain's salaries, &c. and the residue for church repairs.

56 Geo. 3, c. 1*v.*

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The inhabitants in vestry
 to make a rate
 not exceeding
 1s. in the
 pound.

to the repairing the church, and increasing the stipends to the chaplains, which were not an adequate remuneration for the duties required of them, and ought therefore to be increased, repealed so much of the act of *Car. 2* as related to the amount to be raised by rate)—enacted (s. 3) “That it shall and may be lawful to and for the wardens, overseers of the poor, and other inhabitants of the said parish in vestry assembled, and they are hereby empowered, from and after the passing of this act, yearly and every year, upon notice thereof publicly given in the parish church upon Sunday next before, &c., to make an assessment upon all the inhabitants, &c. by a pound rate, not exceeding one shilling in the pound. A subsequent clause (s. 5) directed the wardens to pay, by quarterly payments, to each of the two chaplains the yearly sum of 300*l.*, the salaries as before to the schoolmasters, and all the residue of the monies so to be raised as aforesaid, to the repairs of the said church,” (in the words of the 22 & 23 *Car. 2.*)

It appeared that the church of St. Saviour's is at present very much dilapidated, and not capable of accommodating more than 550 persons, although it is the only place of worship, according to the established church in the parish, which contains 19,000 inhabitants.

At a vestry meeting of the inhabitants, on August 8, 1836, held in pursuance of notice to make a church-rate, (inter alia) a motion was made that the making of a church-rate should be postponed till the 31st of July next; and an amendment was moved “that a rate of fourpence in the pound be now made.” The motion having been carried by show of hands, on a poll being taken, there were—

For the original motion . . . 350

For the church-rate . . . 257

Majority against the rate 93

No previous church-rate had been made in the parish, during the year 1836; and three-quarters of a year salary was due on the 10th October, 1836, to the chaplains, schoolmaster, &c.; but on their demanding payment from the church-

wardens, the wardens stated that they had no funds out of which to pay.

It further appeared, that at a vestry meeting held April 5, 1836, a committee was appointed to examine into the receipts and expenditure of the wardens of the parish; and as to the distribution and application of the charity estates, the committee reported as follows:—

<i>Receipts.</i>	£	s.	d.	<i>Expenditure.</i>	£	s.	d.
Rents . . .	929	8	6				
Fees . . .	50	0	0				
Committee room	50	0	0				
	1029	8	6				
Deficiency .	988	19	2				
	2018	7	8		2018	7	8

Sir *F. Pollock*, in Michaelmas term last, upon affidavits setting out the above particulars, obtained a rule calling upon the churchwardens, overseers of the poor, and inhabitants of St. Saviour's, to shew cause why a mandamus should not issue, directed to them, commanding them to call a vestry and make a rate in pursuance of the 22 & 23 *Car. 2*, and of the 56 *Geo. 3*, c. lv.

Thesiger now shewed cause against this rule, on behalf of the wardens. The wardens are compelled to resist this rule, because however anxious they may be that a rate should be made, and the necessary repairs to the church done, if this Court should issue a mandamus, they have not the power to pay obedience to the writ. The 56 *Geo. 2*, c. lv., is intitled, "An Act to enlarge the Powers of 22 & 23 *Car. 2*, c. ii;" but it does more, for by the latter act six of the late churchwardens were empowered to make a church-rate themselves; but the 56 *Geo. 3* only makes it *lawful* for the wardens, overseers, and inhabitants in vestry assembled, and thereby *empowers* them, to make a rate. The 56 *Geo. 3*, therefore, points out how the rate shall be

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made, and the wardens are driven to contend that its provisions have been complied with. In *The King v. St. Peter's, Thetford* (a), the Court refused a mandamus to the churchwardens to make a rate for the repairs of the church, because it was a subject purely of ecclesiastical jurisdiction. In *The King v. St. Margaret and St. John, Westminster* (b), the Court held, that they could not grant a mandamus to compel the making of a church-rate, although they would, to put in motion the proper parties to inquire whether a rate should be made or not. In *The King v. Wir* (c) the question was discussed whether a mandamus could be directed to the inhabitants of a parish for any purpose, and some precedents are inserted in the note, one of which is a mandamus to the inhabitants of Clerkenwell, to assemble and make rates for repairing the church; but it is not disputed that a mandamus can go to compel the inhabitants to assemble. It may perhaps be contended, that the inhabitants of St. Saviour's are liable to repair, &c. *quasi ratione tenuræ*, and there is no doubt that they hold their lands tithe free; but the question still remains, how can this Court compel them to make the rate? In *The King v. St. Mary, Lambeth* (d), the Court granted a mandamus to make a church-rate, but that was a rate on the Church Building Act, (58 Geo. 3, c. 45,) and Lord Tenterden held, that as the inhabitants had assented to borrow money on the credit of the rates, the making a rate to pay a debt was not matter of ecclesiastical cognizance. In the present case the wardens are most desirous that a rate should be made, but doubt whether one can be made with safety to themselves.

M. D. Hill shewed cause for the inhabitants. The 56 Geo.

(a) 5 T. R. 364. *Thursfield v. Jones*, 1 Vent. 367. See *Anon.* 1 Mod. 79; *Rogers v. Davenant*, 1 Mod. 194—236; and Degge's Parson's Counsellor, 204, 7th ed., on the question whether the churchwardens may proceed alone to make a rate, if the parishioners refuse.

See also *Roberts and others*, Hetley, 61; and the form of a consultation to proceed against the parishioners in the Spiritual Court, Reg. Brev. 44 b.

(b) 4 M. & S. 250.

(c) 2 B. & Ad. 197.

(d) 3 B. & Ad. 651.

3, authorizing the inhabitants in vestry to make a rate, does not enable this Court to compel them so to do; for in *Rex v. St. Margaret and St. John, Westminster* (a), the act (b) of parliament required the parishioners to make a rate, but the Court said they could do no more than compel the parishioners to meet. The sole question, therefore, is, whether this is not a case for ecclesiastical cognizance. In cases of this kind the only power the Court has is derived from legislative enactment. Until the statute 2 & 3 *Edw.* 6, c. 13, no suit lay in the temporal Court for the subtraction of tithes; but that act gave the power to sue for treble of the tithes withheld, in order, says Sir *William Blackstone*, "to make the course of justice uniform by giving the same reparation in one court as in the other (c)." So, except where legislative enactment intervenes, all other matters relating to the church, such as mortuaries, oblations, &c., are to be sued for in the Ecclesiastical Court, provided that the right does not come in question. In this case, the 56 *Geo.* 3, establishes a statutory *modus decimandi*, which, like other *moduses*, must be enforced in the Court spiritual. If this Court had not the power before that act to enforce the making of a rate, what addition to their powers does the act give?

In a case of the first impression, the Court will not grant a *mandamus*, even if the prosecutor be entitled to the writ, unless it can be seen that the writ will be obeyed. If the writ should issue, a meeting in vestry will be held, and the rate will be again refused. It is said the stipends are in arrear; but there are other funds out of which the stipends may be paid. Besides, out of the rate raised under 56 *Geo.* 3, payment of the stipends should be the first disbursement.

Sir *F. Pollock* contra. If the Court has power to issue the writ, it will of course exercise its power if there is occasion, and will find means to insure obedience to its orders. As to this being a case of ecclesiastical cognizance, directly

(a) 4 M. & S. 250. (b) 10 *Ann.* c. 11; s. 54. (c) 3 *Comm.* 89.

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it should appear in a court spiritual to be an application for raising a rate enforced by act of parliament, prohibition would go. But it is an error in terms to call it a church-rate. The 5th section of 56 *Geo. 3* directs that the rate to be made shall be confirmed and allowed by two justices of the peace. How is the Ecclesiastical Court to get two justices to confirm or allow? Besides which there is an appeal against the rate given to the quarter sessions by the 17th section. It is then said that there are other funds out of which the stipends may be paid, but the act says that the rate so to be made as aforesaid shall be applied as hereinafter mentioned, (that is to say,) the wardens, by quarterly payments, shall pay yearly unto each of the chaplains the yearly sum of 300*l.*, unto the schoolmaster and usher the yearly sum of 30*l.*, and all the residue of the monies so to be raised as aforesaid, shall be applied towards the repairs of St. Saviour's Church. The parties, therefore, claim the stipends here as parliamentary annuitants. It is suggested, however, that the wardens may pay the stipends out of other funds, and let the church perish; but the act is imperative upon them to make a rate.

LORD DENMAN C. J.—The only question in this case is, whether it is shewn that the 56 *Geo. 3*, confers a power upon this Court to compel the parish to make a rate for the purposes mentioned in the acts of parliament, in consequence of a grant to them of certain possessions of the old monastery, for it is clear there is no power to make a rate for other purposes. The purposes, I take it, for which that grant was made, are described in the 22 & 23 *Car. 2*, which recites, that *James 1*, by his letters-patent, granted the rectory of St. Saviour's to certain persons in trust for the wardens of the parish, and their successors, enjoining them, out of the revenue thereof, to maintain two chaplains, a schoolmaster and usher, and to pay the other charges issuing out of the rectory, and that the revenues of the rectory were not sufficient to meet these charges; it then relieved the parishioners from the payment of tithes, and

enacts, that the churchwardens, calling together six or more of the late parish officers, should make a rate not exceeding 350*l.* per annum, and out of it that the wardens should pay the stipends, &c., and all the residue should be applied to the repairs of the church. The 56 *Geo.* 3 then directs that the rate for these purposes shall be made by the wardens, overseers, and inhabitants in vestry assembled. It seems to me to be clear that the vestry by that latter act are placed in the same situation that the parish officers filled before that act, and that on application to this Court we must compel the vestry in the same manner that we should have compelled the wardens under the statute of *Car.* 2. The rule therefore must be made absolute for a mandamus, and we shall then hear if any thing is raised upon the return. In *Rex v. Wix*(a) there was some doubt at first whether a mandamus could issue to the parishioners; but Lord *Tenterden*, on further investigation, expressed himself satisfied that it might. The rule, therefore, must be made absolute.

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WILLIAMS J. (a) concurred.

Rule absolute.

(a) 2 B. & Ad. 197.

(b) *Littledale J.* was absent from illness. *Coleridge J.* was sitting in the Bail Court.

The KING v. The Justices of BUCKINGHAMSHIRE.

Monday,
January 30th.

GUNNING, in Michaelmas term last, had obtained a rule calling upon the defendants, three of the justices of the peace for the county of Buckinghamshire, to make a rate for rebuilding a parish church, and to make a rate for defraying the principal and interest of the sum borrowed, on the "houses, warehouses, shops, buildings, lands, tenements, and hereditaments, rated or rateable to the poor," held, that tithes were rateable under these words.

1. Where a local act empowered the trustees there-
2. By the act, persons who refused to pay the rate were to be summoned before a magistrate, and if they then refused, the magistrate was authorized and required to grant a distress warrant to levy the amount. A tithe owner having refused to pay the rate, on the ground that tithes were not rateable under the act, the magistrate refused to grant a distress warrant; but the Court of King's Bench issued a mandamus to the magistrate to compel him so to do.

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the county of Bucks, to show cause why a writ of mandamus should not issue, directed to them, commanding them to proceed to grant a distress warrant upon the goods and chattels of *Henry Webb*, for a rate made in pursuance of 1 W. 4, for taking down the parish church of Great Marlow, in the county of Bucks, and for rebuilding the same on or near the then present scite.

One section of the act empowered the trustees therein named to raise, for the purposes of the act, a sum not exceeding 10,000*l.*, to be charged upon the rates to be made and collected by virtue of the act.

A subsequent section enacted, that it shall be lawful for the trustees, and they are hereby authorized and empowered, until all the monies necessary to be borrowed under and by virtue of this act, and the interest thereof, shall be paid off, to make a rate, &c. not exceeding 2*s.* in the pound, in any one year, on the full annual rent or value of the houses, warehouses, shops, buildings, lands, *tenements and hereditaments rated or rateable to the poor* of the said parish of Great Marlow, on all and every the tenants and occupiers of the said parish." This rate was to be appropriated in paying the interest, and not less than one-fortieth of the sum borrowed in every year.

Persons refusing to pay this rate were to be summoned before a magistrate, and upon hearing the summons and ordering the party to pay the rate, in case of refusal or a non-compliance, the magistrate was authorized and required to issue a distress warrant for the amount. An appeal against the rate was granted by the act to the trustees, and from their decision to the quarter sessions. It appeared on affidavits, that the trustees had raised a sum of 8400*l.*, and that a rate for the sum 31*l.* 10*s.* had been duly made on *Henry Webb*, who was the lessee of the great tithes and small tithes, and glebe land of the parish, under the Dean and Chapter of Gloucester. On Mr. *Webb's* refusal to pay he was summoned before two magistrates, and upon Mr. *Webb's* alleging that he was not chargeable, as the tithes

and glebe land on which he was assessed were not rateable under the act, the magistrates refused to grant a distress warrant to levy the amount.

Sir *W. W. Follett* and *Phillimore* now shewed cause. There is no doubt that generally tithes are not rateable to church-rates, because the parson is bound to repair the chancel, and it would be a double burden if he had to repair the body of the church also (a); and, in fact, the lessor of the tithes never yet has been rated to church rate in this parish. But it is said, under the words of this section, "tenements and hereditaments rateable to the poor," that tithes are an hereditament rateable to the poor, and therefore may be rated to the church-rate. It is contended, however, that the word 'hereditament,' which is the only one that can be contended to include tithes, applies to property *ejusdem generis* with that mentioned in the section, and is not to be construed so as to include a subject-matter never intended by the legislature to be rated. There was a recent case before this Court, in which the meaning of the word 'hereditament' in a local act was discussed, and it was held not to have its large and comprehensive meaning. *Phillips v. Tomes* (b) is a case in point, as it shews, that though the word 'hereditament' is a word of the largest signification, it does not necessarily include tithes. *Rex v. Manchester and Salford Waterworks* (c), turned upon the meaning of the word 'tenement'; the question was, whether the liberty conferred on the company by act of parliament, of laying pipes, constituted a tenement within the act. The words of the act imposing a rate were, upon the tenants and occupiers of all messuages, houses, brewhouses, and other buildings, gardens or garden ground, and other tenements, and the Court held, that *tenement* was used in a very limited sense, and to be construed by the other words in the act. *Rex v. The Trustees, for Paving Shrewsbury* (d),

(a) 1 Gibson Cod. 199, tit. 9, c. 5.

(b) 3 B. & P. 362.

(c) 3 D. & R. 20; S. C. 1 B. & C. 630.

(d) 3 B. & Ad. 216.

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is on a different principle, but still it is favourable to the views now contended for. The question was, whether 'hereditament' was to be confined to hereditaments *ejusdem generis* with those immediately beforementioned. But as the clause contained, after the word 'hereditaments', a special exception of meadows and pastures, which would generally be included in the word 'hereditaments', Lord *Tenterden* C. J. held, that the exception clearly shewed that hereditaments was used in its full sense, except as regarded the meadows so specially exempted. The stat. 32 H. 8, c. 7, is also applicable, for it distinguishes clearly between tithes and hereditaments. So in this act the word 'tenement' is used clearly in a sense which would not include tithes. Besides, as the magistrates have refused to grant a distress warrant, on the ground of the tithes not being rateable, the Court will not put them to the expense of defending an action on a doubtful question. If the legislature had intended that the tithes should have been rated, it would have been easy to include them by express words, without leaving any doubt upon the matter.

Kelly, contra. It may readily be conceded, that when words are found together, beginning with those of larger meaning, and going down to particular descriptions, no word of larger meaning at the conclusion will take in a subject-matter of a different kind to those particularized. But that is not the case here, as the sentence in which hereditament is found, is quite incomplete without the words which follow, "rated or rateable to the poor," which give a meaning to all the expressions used. In none of the cases cited was there any such explanatory clause to be found. This has been argued as if it were a case of ecclesiastical law, which is a fallacy, for these acts are framed with an express view to save expense, by taking the poor law assessment as a basis on which a rate is to be made. The only question that can occur is, whether such property be a house, or an hereditament rateable to the poor. When

that is answered in the affirmative, no ground for doubt remains.

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Lord DENMAN C. J.—We are quite convinced that no doubt exists in this case, and that it would be repealing the act of parliament to hold, that tithes, which are an hereditament clearly rateable to the poor, were not rateable in the present case. Where we entertain a doubt we will not expose the magistrates to the inconvenience of an action, but having no doubt in this case, the rule must be made absolute.

WILLIAMS J. (a) concurred.

Rule absolute.

(a) *Littledale J.* was absent from illness. *Coleridge J.* was in the Bail Court.

The KING (on the Prosecution of the Parochial Auditors of St. Pancras) v. the Church Trustees of ST. PANCRAS.

Tuesday,
January 31st.

A Rule for a mandamus in this case had been made absolute against the church trustees of St. Pancras, acting under the 56 *Geo.* 3, c. xxxix. and 2 *Geo.* 4, c. xxiv. (a), but was afterwards quashed on a point of form. Another rule for a mandamus was subsequently made absolute, upon which the following writ issued :

The trustees appointed under local acts of parliament for building a church, &c., and authorized to levy rates upon the inhabitants of the parish, whose accounts were directed to be audited and

(a) 5 N. & M. 219, where the argument in the present case are sections of the acts relied upon in set out.

allowed by the quarter sessions, are nevertheless compellable, under s. 34 of the Vestry Act (1 & 2 *W.* 4, c. 60,) to produce their accounts for the last half year, before the auditors of the parish accounts, appointed under and in consequence of the adoption by the parish of the lastmentioned act.

2. Where the mandamus recited that it was the duty of the trustees, who had been required to produce accounts (in the terms of the 1 & 2 *W.* 4, c. 60, s. 35,) and that they had refused to do so, and then ordered them to produce the accounts which they were ordered to keep by the local acts, held, that the mandamus was bad in ordering more than was warranted, either by the grievance recited, or by the general vestry act.

3. Although the return made to a mandamus may be in the nature of a demurrer, the counsel for the crown are entitled to begin.

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"Whereas we have been given to understand that the auditors of accounts of the parish of St. Pancras, in the county of Middlesex, duly appointed and acting under an act of parliament, passed in the second year of our reign, for the better regulation of vestries, and for the appointment of auditors of accounts in certain parishes of England and Wales, heretofore, to wit, on &c., in exercise of the powers given them by the said last-mentioned act, did, by a writing for that purpose, signed by five of them the said auditors, summon and require you the said trustees, by your clerk, to produce and lay before the auditors of the said parish, acting under the said last-mentioned act, at an adjourned meeting of the said auditors, to be holden in the said board room of the vestry of the said parish, situate in Gordon Street, in the said parish, on Saturday, the 20th day of June then instant, at 11 of the clock in the forenoon, a true and just statement or account in writing, accompanied with proper vouchers, of all sums of money which might have come to the hands of you the said trustees, or any of your treasurers, and also of all monies paid, laid out, and expended by you the said trustees, or by any person by you employed and responsible to you the said trustees, within the half year preceding the 31st day of May then last, under and by virtue of the said two first above-mentioned acts of parliament(a), and they did thereby summon and require you the said E. W. S. to come before and attend them the said auditors at such adjourned meeting, and to bring with you all books of accounts, writing, papers and documents, which might concern the said accounts, and to give such information as to the particulars of such accounts as you the said E. W. S. might be enabled to give. And thereupon you the said trustees ought, by your clerk, to have produced and laid before the said auditors, at the place and time aforesaid, such statement or accounts as aforesaid. And you the said E. W. S. ought thereupon to have attended before the said auditors, at the place and time aforesaid, and to have brought with you such books, writings, papers and documents as aforesaid, and have given such information as to the particulars of the said accounts, as you might be enabled to give." [The writ then stated a refusal, and proceeded thus:]

"We do command you the trustees, acting under and by virtue of the two first-mentioned acts of parliament(a), firmly injoining you that by your clerk you produce and lay before the auditors of the said parish of St. Pancras, elected and acting under the said act of parliament, of the second year of our reign, pursuant to the provisions of the said last-mentioned act, the accounts kept by you the said trustees, under the said act of the 56th year of King George the Third; and also the accounts kept by you under the said act of the second year of King George the Fourth, as trustees as aforesaid, at a meeting or adjourned meeting of the said auditors, at the board room of the vestry of the said parish. And we also command you the said E. W. S., firmly injoining you that you attend the said auditors at such meeting or

(a) 56 Geo. 3, c. xxxix.; 1 & 2 Geo. 4, c. xxiv., mentioned in the direction of the writ.

adjourned meeting, and bring with you the books of accounts, writings, papers and documents, which may concern the said accounts kept by the said trustees, under and by virtue of the said last-mentioned acts of parliament, and to give such information as to the particulars of such accounts, as you the said *E. W. S.* may be enabled to give, or that you shew us cause to the contrary thereof."

The return stated, that by the 1 & 2 *Will.* 4, or the common law, neither the trustees nor their clerk were bound to attend before the auditors, or to bring, produce, and lay before them the accounts, writings, books, papers, and documents, or any of them, or to give the within-mentioned information as to the particulars of the accounts.

Sir *J. Campbell* A. G. appeared (a) to argue against the return, but,

Sir *W. W. Follett*, contrà, claimed to begin, on the ground that the return to the mandamus was in the nature of a demurrer, and was not properly a return. [Lord *Denman* C. J. The party objecting to the mandamus might have moved to quash the writ, but if there is any thing in the shape of a return, counsel for the crown must begin.]

Sir *J. Campbell* A. G. It is to be contended to-day, that the provisions of the General Vestry Act (b), as to auditing the accounts of boards of parochial expenditure, do not apply to the defendants. This Court, however, including *Parke* J., who was originally of a different opinion, has already solemnly decided that that act does apply to them (c). All that is necessary to be proved now is, that the defendants form a board, having a control over any part of the parochial expenditure, as it is clear that the 1 & 2 *Will.* 4, c. 60, s. 34 & 35, gives the auditors appointed by that act, power over all such boards. Now the 56 *Geo.* 3, c. xxxix. under which the defendants act, is an act entirely for parochial purposes, giving the defendants, as trustees, great powers over the bulk of the parochial expenditure.

(a) Jan. 26, cor. Lord *Denman*
C. J., *Williams* J. and *Coleridge* J.

(b) 1 & 2 *Will.* 4, c. 60.

(c) 5 N. & M. 219.

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But sect. 77 of that act, and sects. 36 & 37 of the Vestry Act (a), are relied on by the other side; and it is contended that it could never be intended to subject the trustees' accounts to an audit, when a most efficient audit was already provided by the local act, and that there is such a discrepancy between the place of deposit required for the books of account, by the local and general act, as to shew that the church trustees of St. Pancras are not at all affected by the latter. But first, if there should be any discrepancy, it is immaterial, as the Vestry Act (a), which comprehends (sect. 34 & 35) boards appointed under former local acts, must be carried into effect. There is however no discrepancy, for the audit required by sect. 77 of 56 Geo. 3, once a year, is quite consistent with the privilege given to the rate-payers by 1 & 2 Will. 4, c. 66, s. 35, of having the defendants' accounts laid before auditors once every half year. It might as well be said that overseers' accounts could not be audited by the auditors under the Vestry Act, because their accounts by law were to be passed at special sessions, and might be appealed against. The defendants' accounts are quite analogous to overseers' accounts. Besides, the auditors have not the power of allowing or disallowing, as the magistrates have at sessions, they are only to make remarks, to criticise the accounts, and to afford grounds to the magistrates, when the accounts afterwards come before them, to settle them and strike a balance. Secondly, it is objected that there is an inconsistency in the place of deposit, required by the two acts for the accounts. But that is founded on a fallacy, for although the local act (a) requires the book of accounts to be kept in the office of the clerk to the trustees, the Vestry Act (b) only requires "a true and just statement, or account in writing, accompanied with proper vouchers," to be laid before the auditors, and therefore the original account is not required to be produced by the latter act. Then sect. 37 enacts, that the accounts, when audited and signed, shall remain at the office of the

(a) 56 Geo. 3, c. xxxix.

(b) 1 & 2 Will. 4, c. 60.

clerk of the vestry; not a word is said of the vouchers, those original documents therefore may be returned to the clerk of the trustees, to be produced with the original book of accounts before the magistrates.

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Sir *W. W. Follett*, (*Kelly* and *Peacock* were with him,) *contra*. When the application in this case was first made to *Parke J.*, he thought that the church trustees of St. Pancras did not come within the provisions of the Vestry Act. The subsequent decision of Lord *Denman C. J.* (a) clearly proceeded on a mistake, in supposing that the rate-payers had no power under the local act to inspect the trustees' account. When sect. 77 of the local act, giving that power, was afterwards pointed out in shewing cause against the rule for this mandamus, the Court thought the question deserved reconsideration. The acts under which the church trustees are appointed, are the 56 *Geo. 3*, for building an additional parish church in St. Pancras, and the 1 & 2 *Geo. 4*, c. xxiv. for altering and enlarging the 56 *Geo. 3*, the powers given to them were to raise a sum of money for these purposes, and to make a rate for the repayment of the debt and interest. These are not items of ordinary parochial expenditure. The trustees do not form a board, they are nominated by an act of parliament, are then elected by themselves, and although they have control over parochial money, it is only for a specific purpose. The object of the Vestry Act was to give the auditors chosen by the parish, control over all boards in a parish similar to a vestry. [*Coleridge J.* What board could there be in a parish, having control over parochial expenditure, except under an act of parliament, as in case of highways?] It is apprehended there were many boards in different parishes, emanating from the vestry and not appointed by act of parliament; and before the Vestry Act, it is submitted that there was no power to audit the accounts of such boards or vestries. [*Coleridge J.* The only accounts that the vestry could have

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were with respect to the highway rate, church and poor's rate, and all those were subjects of specific regulation.] By sect. 77 of the local act, complete power is given to the parish to control the expenditure of the church trustees, and there is nothing whatever gained by calling in the provisions of the Vestry Act. As two audits by two different bodies are quite incongruous and absurd, for one set of auditors might allow sums which the other might disallow, the Attorney-General is obliged to contend that the auditors under the Vestry Act have no power to allow or disallow, but merely to look at the accounts, otherwise he would have to contend that the Vestry Act upsets the local acts. He must contend also, that the auditors have no power to compel any one to produce any books before them at all, for he says it is only necessary for a statement of account in writing to be produced. But the mandamus asks for all the accounts kept by them under the local acts.

This leads to an objection to the terms of the writ. For the mandamus recites a refusal of the trustees to comply with a requisition of the auditors to produce a statement or account in writing in the terms of the 35th section of the local act, and then commands them to produce the accounts kept under the 56 *Geo. 3*, and also the accounts kept under 2 *Geo. 4*, and all books of accounts, writing, papers and documents, which may concern the said accounts. Now sect. 35 of the Vestry Act only requires an account for the last half year to be produced, therefore the mandatory part of this writ would not be complied with unless every account in their possession, since the formation of the trust, was produced. Again, sect. 77 of the local act requires an account to be kept by the trustees of the rates to be made in pursuance of the act, and a book of the receipts and expenditure; all these likewise must be produced, or the writ would be disobeyed; but what power is there under sect. 34 of the Vestry Act, to ask for accounts of the rate and assessment made in former years? This alone forms a fatal objection to the writ.

Sir *J. Campbell* A. G. in reply. The objections urged as to the Vestry Act, and applied to the defendants, were all raised when the writ for a mandamus was granted. It is submitted the objection to the form of the mandamus is not sustainable. The writ recites as a grievance that the trustees had been required by the auditors to produce an account in writing, under sect. 35, of the Vestry Act, and states that it was their duty to have produced such statements or accounts as aforesaid, meaning the account under the Vestry Act, and that the trustees had refused to produce such statements or accounts as aforesaid; and it then commands them to produce "*the accounts*," meaning such accounts as were before referred to, and which were held by them as trustees, acting under the two local acts. There is no reason to suppose any intention to carry the mandate further than the grievance referred to in the preceding matter. [*Coleridge* J. Sect. 35, of the Vestry Act, entitles you to an account in writing of the preceding half year, but the writ compels the production of the accounts kept by the trustees under the local act.] It is shewn clearly throughout the writ, what the accounts required are, and a reasonable intendment must be given to the words in the mandatory part.

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LORD DENMAN C. J., on this day delivered the judgment of the Court, as follows:—The question in this case arises on the return to a mandamus. Two objections were made to the writ; the former rested on grounds either argued against the original issuing of the writ, or applicable to it, and which might have been urged. We have listened to this argument with much attention, but we see no reason to depart from the opinion which we formed on the previous discussion, and we adhere to the judgment given on that occasion, which was not come to without much consideration. The judgment will be found in

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5 Nevile and Manning (a), and in the recent number of *Adolphus and Ellis (b)*, which has appeared since the argument in the present case. In a case of considerable nicety, it is unnecessary to add any thing more to what is there laid down. The second objection arises on the mandatory part of the writ, which was alleged to be more full than was warranted either by the recitals of the writ, or by the statute 1 & 2 Will. 4, c. 60, ss. 34 & 35, under which the writ has issued. By the recital it was stated, that the trustees had been called on to lay before the auditors of the parish, a true and just account—a statement or account in writing, accompanied with proper vouchers,—of all sums which might have come into their hands, and all monies laid out and expended, within the half year preceding the 1st of May then last past; and by the same recital it is stated, the clerk had been required to bring all books of accounts, writings, papers and documents, which might concern the said accounts. Now by the 34th section of the act, the auditors are to meet twice at least in each year, and to have laid before them a true and just statement of accounts in writing, accompanied with proper vouchers, of all sums of money that may have come to the hands of the vestry, or been laid out, since the last period up to which the accounts were audited; and by sect. 35, the power to require the production of the books, &c. is limited to such as concern “the said accounts,” and those accounts, after the auditing and signing, are to be deposited and remain at the vestry clerk’s office. The limited nature of the requisition in this case was much insisted on in argument for the writ, and was indeed material to obviate the objection of inconsistency between the provisions of this statute and that of the local act, the 56 Geo. 3, under which the trustees are appointed, but the mandatory part of the writ commands them to produce the accounts kept by them, under the act of the 56 Geo. 3, and also kept by them under the 1 & 2 Geo. 4, and commands the clerk to bring with him the books of

accounts, writings, papers and documents, which may concern the said accounts kept by the said trustees.

These general words would certainly not be satisfied by obedience to the limited requisition stated in the recital, to which alone the refusal of the trustees applies, and to which alone, in our opinion, the statute of the 1 & 2 Will. 4 extends.

For this reason, we think the writ cannot be sustained. We are of the same opinion as we were on the former occasions; we are of opinion now as then, although we may mould the rule, we cannot mould the writ, and that the mandamus therefore should be quashed.

Rule absolute.

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THIS was an indictment against the defendant, as keeper of the gaol of Newgate, (which was alleged in the indictment to be the county gaol of the county of Middlesex), for refusing to receive certain prisoners who had been committed by divers justices of the peace for the county of Middlesex, in and out of sessions, to the gaol of Newgate, some for safe custody in default of sureties to keep the peace, and others under sentence of imprisonment for misdemeanors. At the trial at Westminster, at the sittings after Trinity Term, 1835, before Lord *Denman* C. J. and a special jury, it appeared that this was a question between the corporation of the city of London and the Middlesex magistrates, as to the right of the latter to commit misdemeanants to Newgate. Various acts of parliament(a) were put in at the trial, by which the gaol of Newgate had been

(a) 7 Geo. 3, c. 37, 18 Geo. 3, c. 48, 52 Geo. 3, c. ccix.

the county gaol

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January 31st.

The Gaol Act, (4 Geo. 4, c. 64, s. 13,) which provides that all the powers given by that act to justices at quarter sessions shall be exercised, so far as regards the prisons in the city of London, by the court of mayor and aldermen, does not enable the latter to prevent the Middlesex magistrates from committing prisoners to the gaol of Newgate, which is of Middlesex.

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recognized as the county gaol of Middlesex, and it was admitted that Newgate had been used from time immemorial as the county gaol of Middlesex, and that down to the year 1826, the Middlesex magistrates had been in the habit of committing prisoners on all charges to that gaol. From the year 1826 to the present time the Middlesex magistrates had also committed prisoners on all charges to Newgate, but in the former year, the court of the lord mayor and aldermen made the subjoined order in pursuance of the Gaol Act, 4 Geo. 4, c. 64, s. 2, under which the defendant justified, which provides,

"That in each county, &c. in England there should be one gaol and one house of correction, and that the regulations of the act should extend to the several gaols and houses of correction in the cities of London and Westminster."

Section 4 enacted, "that, at the Michaelmas quarter sessions at every county in England after the passing of the act, the justices of the peace should proceed to carry the act into effect, and that such justices shall, by order to be made for that purpose, ascertain and declare to what class of prisoners every such gaol or house of correction of any parts of them respectively shall be applicable, and every such order shall be signed by the chairman of such sessions, and shall be notified by the clerks of the peace to the several justices of the peace in every such county, riding or division, district, city, town, or place, respectively, and notice thereof shall be inserted in three of the newspapers usually circulated in such county, &c. within three weeks after any such order shall be made at any such sessions; and a copy thereof shall be served upon the keeper of every gaol or house of correction within every such county, &c. and after the making such order and service of such copy thereof upon such keeper as aforesaid, such class of prisoners as shall be specified in such order, and no other, shall be committed to or detained in such gaol, house of correction, or any part of them respectively."

Section 9 provided, "that the rights of mayors, &c. of any city, town, or liberty, having a separate jurisdiction, shall not be affected by the act."

Section 10 enacted, "that the rules and regulations contained in the act for the classification of prisoners should be observed in all gaols of the places mentioned in Schedule A. to the act."

Section 13 provided, "that all the powers given by the act to justices at quarter sessions should be exercised, so far as regards the prisoners in the city of London and liberties thereof, by the court of mayor and aldermen of the said city, and not by the said mayor and aldermen as magistrates at the session to be holden in and for the said city."

Section 48 enacted, " that every gaol, &c. for every county, &c. which is now built or should be built, which gaol is or should be within the limits of any other county, should be deemed and taken to be part of the county, &c. for which the same should be used as a gaol, and so long as the same should be used and no longer; and the justices for the county for which the same should be used as a gaol should, during the time that the same is so used, have the same power and authority therein, as if the same were not situate within the limits of any other county."

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The order made by the mayor and aldermen, 6th July, 1826, at a court of the mayor and aldermen held in the Guildhall of the city of London, after reciting the provisions of the 4 *Geo.* 4, c. 64, for classifying the prisoners in different gaols, and that the powers to be exercised by the justices in counties should be exercised by the court of the mayor and aldermen in the city of London, proceeded to order, " that the class of prisoners to which the said gaol of Newgate shall be applicable shall be such prisoners only as are committed for felonies, either before or after conviction for the same; and that all persons not coming within the said class of prisoners, who may be committed to the gaol of Newgate, be removed, in pursuance of the said act, to the house of correction in and for the said city; and that the class of prisoners to which the Giltspur Street Compter shall be applicable, shall be such prisoners as are committed to the said last-mentioned prison for misdemeanors, together with such other prisoners as have been usually committed to the said prison for felonies perpetrated in the said city, or felons apprehended in the said city previous to their removal to the sessions of gaol delivery of Newgate, or of the gaols of the respective counties wherein the same have been perpetrated, for trial, and for all other crimes or offences under the degree of felony." By the direction of the Lord Chief Justice the jury found a verdict for the crown, and leave was given to move to set that verdict aside, and enter a verdict of not guilty.

A rule having been obtained in Michaelmas Term, 1835, for entering a verdict for the defendant,

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Erle (with whom was *J. Addison*), on a former day in this term (a), shewed cause against it. The question, whether the mayor and aldermen of the city of London have the power to exclude prisoners committed by the Middlesex magistrates depends upon the 4 *Geo. 4*, c. 64. The 4th section of that act enables the justices of the peace, at the quarter sessions for their county, to make regulations for classifying prisoners, and to direct to what prison within their respective counties the different classes of prisoners shall be sent to. But the 48th section enacts, that every gaol which is within the limits of another county shall be deemed to be the gaol of the county for which the same is used, and the justices of the county for which it is used shall have the same authority over the gaol as if it were not situated within the limits of another county. If it can be made out therefore that Newgate is the gaol of the county of Middlesex, it is clear that the London magistrates have no right to make regulations restricting the use of the gaol. But it is not denied that Newgate has been from time immemorial the county gaol of Middlesex. It has been treated so in the indictment, by the venue being laid in Middlesex; and the effect of the 48th section of the act is to make it as if situated within the county of Middlesex. It is true, that for other purposes the gaol is in the city of London, and subject to the regulations of the London magistrates. But it is no new proposition in law, that a place may be for some purposes in one county, and in another county for other purposes. Thus, in *The King v. Gough* (b), it was held, that although the Town Hall at Gloucester is situated within the county of the city of Gloucester, yet, that perjury committed there, at a trial at nisi prius for the county of Gloucester, was properly laid to have been committed in the county of Gloucester; and it is understood that at Worcester, and other places, the same point has

(a) Friday, Jan. 20, before Lord *ridge* Js.
Denman C. J. Williams and Cole- (b) 2 Dougl. 791.

occurred. That case shews, *quoad* the assizes, the building was in the county of Gloucester, but for other purposes in the city of Gloucester. The gaol of Newgate is just in the same case, for commitments from Middlesex it is within that county, while on other occasions the London magistrates have the jurisdiction over it. This view is confirmed by the late act for establishing the Central Criminal Court (a), the various sections enabling the adjacent counties of Kent, Essex, and Surrey, to send their prisoners to Newgate, and establish a mode by which the magistrates of these counties may agree with the city of London for the expenses of the prisoners so sent; but nothing of the kind is said as to Middlesex, the right of Middlesex to commit to Newgate being thereby recognized. The power claimed by the London corporation now is to exclude all but felons committed from Middlesex; but it is clear, if they establish this right, they must have the power to exclude all prisoners whatever. It is submitted, however, that they have no power whatever over any prisoners committed from Middlesex.

Sir J. Campbell A. G., (with whom were the Recorder, Sir W. W. Follett, the Common Serjeant, and V. Richards,) *contra*. If the order of the mayor and aldermen of 1826 is not valid, there is no power to classify the prisoners according to the 4 Geo. 4, c. 64, in the most important gaol in the kingdom. But it is expressly directed that the regulations of that act shall apply to gaols within the city of London. Newgate is not only within the ambit of the city of London, but is part and parcel thereof; and by s. 13, the court of mayor and aldermen are to make regulations, and have the same power as the justices at quarter sessions in other counties. This being so, it must be implied that the mayor and aldermen have full power to carry

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(a) 4 & 5 Will. 4, c. 36.

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the act into effect. It is not clear how the custom of committing prisoners to Newgate from Middlesex arose. It was probably in consequence of the purchase of the shrievalty of the county of Middlesex by the city of London, upon which the sheriffs, having two sets of prisoners in their custody, committed them to the same gaol; but it is evident that thereby the jurisdiction of the London magistrates over their own gaol is not impaired. As then the Gaol Act is directed to be applied to Newgate, who could carry the provisions into effect? The Middlesex magistrates have never interfered with the arrangements of Newgate; the duties therefore must fall upon the magistrates of London. [*Coleridge J.* I see, by the 4th section, the clerks of the peace are to send the order to the justices of the peace for the county for which it is made; but the London magistrates could have no authority to send to the Middlesex justices. *Lord Denman C. J.* The legislature may have contemplated that the magistrates for the two jurisdictions should meet and make their arrangements for the classification.] No such power is given by the legislature, and the enactment respecting the copy of the order to be sent to the justices is only directory; and sects. 12, and 13, remove all ambiguity, by directing that all orders and regulations shall be made by the mayor and aldermen.

Sect. 48, clearly does not apply to a gaol like Newgate, but to cases like Gloucester and Worcester, where the gaol of a county is situated within the local ambit of the county.

The 4 & 5 *Will. 4*, c. 36, has also been referred to; but it does not bear on the question, as before that act passed a jurisdiction over the whole county of Middlesex was exercised at the Old Bailey, and the object of that act was only to throw in portions of the adjacent counties. [*Lord Denman C. J.* Is not the obvious effect of this order to change materially the burden of maintaining the prisoners committed from Middlesex?] That probably

may be the case, but it must have been a consequence contemplated by the legislature in passing the act.

Cur. adv. vult.

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Lord DENMAN C. J. on this day delivered the judgment of the Court as follows.—This was an indictment against the defendant, as keeper of the gaol of Newgate, for refusing to receive a prisoner committed by justices of the peace for the county of Middlesex, charged with a misdemeanor.

The gaol of Newgate is the county gaol of Middlesex; and the justices of the peace of that county, before and until the year 1826, had been in the habit of committing persons charged with felonies and misdemeanors to that gaol. The same, however, is locally situated within the limits of the city of London, and has always been under the control and direction of the court of mayor and aldermen; the justices of the peace for the county of Middlesex never having visited, nor, except as is above mentioned, in any manner interfered therewith. In the year 1826 the court of the mayor and aldermen made an order, excluding from the said gaol prisoners committed upon a charge of misdemeanor, in obedience to which the defendant acted, and the validity of which raises the present question, which depends upon the construction of the 4 *Geo.* 4, c. 64. That act had for its objects, as by the recital and provisions appears, the regulation of gaols and houses of correction, and particularly the classification of prisoners therein; those provisions expressly extending (by section 2) to the gaols and houses of correction in the city of London. By the 4th section, justices of the peace for the counties and places to which the act refers, “shall, by orders to be made for that purpose, declare to what class or classes of prisoners every such gaol or house of correction, or any part or parts thereof, shall be applicable.” This material

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section, we think, must be understood as applying to cases where the jurisdiction and power of committal were fully known and understood, and not as in any way interfering therewith. It is also further provided, in this same section, that the order above referred to shall in each case "be signed by the chairman of the sessions, and shall be notified by the clerks of the peace to the several justices of the peace in every such county, riding, division, city, &c."—a provision obviously applicable to one and the same jurisdiction, and which in the present instance could not have been complied with.

The 12th section enacts, that it shall be lawful for the court of mayor and aldermen of the city of London, so far as the prisons within it are concerned, and for five justices of the peace, at their quarter sessions respectively, so far as regards prisoners *within their respective jurisdictions*, whether the same be county, riding, division, or other place, to make such further rules as to them may seem expedient, subject to approval, as therein is provided. In this section also, which is in *pari materia* with the fourth, and only as it were a continuance of its powers to future time, the same observation applies with respect to jurisdiction. *That* seems to be assumed as fixed and settled. The court of the mayor and aldermen in the city of London, and justices of the peace at their several courts of quarter sessions, are coupled together in the description of their functions and powers. And with respect to the latter (justices in their respective courts of quarter sessions), their power is expressed to be "within their respective jurisdiction;" and certainly they could make no rules which would have the effect of enlarging their own jurisdiction, or abridging that of others.

It is also observable, that the effect of this order is to transfer the expense of keeping prisoners, committed for trial upon a charge of misdemeanor, from the city of London, which heretofore defrayed it, to the county of Middlesex.

Then follows the 13th section, upon which a good deal of reliance was placed. That provides expressly that all the powers given by the act to justices of the peace, at their several courts of quarter sessions, shall be exercised within the city by the court of mayor and aldermen, and not by them as magistrates at the court of quarter sessions for the said city. We think, however, that this section can only be understood as formally recognizing the general authority of the court of mayor and aldermen, leaving their power in the particular now under our consideration untouched. It may be clear that the authority to make this order, if it existed anywhere, was vested in the court of the mayor and aldermen. That, however, obviously leaves the question of their authority as it stood before.

Upon the whole, it is certain that the jurisdiction of the justices of the peace of the county of Middlesex is not directly taken away; and we think that when another and generally consistent purpose is apparent in the act of parliament, it would be too much to attribute to it, upon doubtful implication, such a large and extensive a collateral effect.

We will only add, in conclusion, that although the mode of classing to be enforced by the order in question (and which is rather the classing of prisons than prisoners,) may not be practicable if persons charged with misdemeanors be admitted into the gaol of Newgate, it does not follow that there *might* not be a classification of prisoners therein, though such persons should be admitted. It follows that the rule for an acquittal must be discharged.

Rule discharged.

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*Monday,
January 30th.*

1. The Court of King's Bench will issue a mandamus to a treasurer of a county to deposit with the clerk of the peace, in pursuance of 12 Geo. 2, c. 29, books containing entries of the county expenditure, although the receipts, tradesmen's bills, the gaoler's accounts and copies of the county rate had been already deposited with the clerk of the peace, and the books contain the discharges of the treasurer, and the discharges of the former treasurer, by the justices in sessions.

2. The Court will make a rule for a mandamus absolute, although the affidavits on which the rule nisi was obtained, contain misrepresentation and suppression of facts, if sufficient remains unanswered to warrant the Court in issuing the writ.

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SIR J. CAMPBELL A.G., in Michaelmas term last, had obtained a rule, calling upon Mr. *Payn*, the treasurer of the county of Berks, to shew cause why a writ of mandamus should not issue, commanding him to deposit with the clerk of the said county the two books containing his true and exact account of the sums of money respectively received and paid by him as such treasurer, from the date of his appointment as treasurer, and which accounts had been passed by the justices at the quarter sessions for the county. This rule was obtained upon a statement contained in the affidavits of two magistrates of the county, that the two books mentioned in the rule contained the accounts of the treasurer, which had been passed by the justices at quarter sessions, and which were not deposited with the clerk of the peace, in pursuance of 12 Geo. 2, c. 29(a). The

(a) 12 Geo. 2, c. 29, s. 7. That the said respective treasurer or treasurers shall and are hereby required to keep books of entries of the several sums respectively received and paid by him or them in pursuance of this act; and is and are also hereby required to deliver in true and exact accounts, upon oath, if required, (which oath the said justices, at their respective general or quarter sessions, are hereby empowered to administer,) of all and every the sum and sums of money respectively received and paid by him or them, distinguishing the particular uses to which such sum or sums of money have been applied, to the justices at every general or quarter sessions respectively to be holden within the limits of their commissions, and shall lay before the jus-

tices at such sessions the proper vouchers for the same.

Section 8. And all the accounts and vouchers of the said treasurers and high constables shall, after having been passed by the said justices, at their respective general or quarter sessions, be deposited with the clerk of the peace for the time being of each county respectively, or the town-clerk, high bailiff, or chief officer of any city, town corporate or liberty, who is and are hereby required to keep them among the records of such county, city, town-corporate, or liberty, to be inspected, from time to time, by any of the said justices within the limits of their commissions, as occasion shall require, without fee or reward.

Section 9. That the receipts of such respective treasurer or trea-

affidavit stated, that yearly and quarterly abstracts of the accounts had been published, and stated circumstances to shew the abstracts were incorrect. It appeared, from the affidavits filed in opposition to the rule, that Mr. *Payn* was appointed treasurer of the county in 1822, on the death of his father, who had been treasurer previously. Shortly after Mr. *Payn's* appointment, a general committee of accounts was, at his suggestion, appointed, and the accounts were kept in the following manner: Mr. *Payn* kept a book of entries of the several sums respectively received and paid by him as treasurer, and he delivered to the committee the books of entries, shewing the balance due to or from the county, at the last quarter sessions; also an account furnished to him by the clerk of the peace, of the sums levied and ordered to be paid to him for county rates during the last quarter; and an account furnished to him by the clerks of the respective petty sessions, of all fines received during the last quarter, for fines on summary convictions. The accounts and orders for payment of all sums paid by the treasurer during the last quarter, and the vouchers for the same, when paid, were likewise delivered by Mr. *Payn* to the committee. The justices, after having examined the accounts, signed the book of entries, first adding, that they had audited and passed the accounts, and stating the balance in the hands and due to the treasurer. After

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surers shall be sufficient discharges to all high constables, and the discharges of the said justices of the peace, or the greater part of them, by their orders made at their respective general or quarter sessions, to such treasurer or treasurers, shall be deemed and allowed as good and sufficient releases, acquittances or discharges in any court of law or equity, to all intents and purposes whatsoever.

55 *Geo. 3*, c. 51, s. 18: That the said several treasurers of counties shall, and they are hereby re-

quired, once in every year, to publish in some one of the newspapers usually circulating in the county in which they respectively act, a true and accurate abstract of the account of their receipts and expenditures, under their several heads, for the year immediately preceding the publication of such abstract, signed by the justices of the peace who shall have audited the same, under a penalty of fifty pounds for every omission of such publication.

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the book of entries had been so signed, it was returned to the treasurer, and the vouchers were deposited by the committee with the clerk of the peace. The county rates, fines and payments for borough tresovers, formed the whole of the treasurer's ordinary receipts; and the affidavit set out seven items, as the only other sums received by him.

One of the books of entries mentioned in the rule comprised all the sums received and paid by Mr. *Payn* from the time of his appointment up to and including Michaelmas sessions 1833, and also the receipts and payments of his late father; and Mr. *Payn* never had any discharge from the county for the sums entered in the book, except the discharges so signed in the book. The other book comprised all the sums received and paid by Mr. *Payn* from and including the Epiphany quarter sessions 1834, up to and including the Epiphany quarter sessions 1837.

At the Easter quarter sessions, 1835, a third book, being an exact copy of the second book, was deposited with the clerk of the peace, and at the Midsummer and Michaelmas quarter sessions 1835, and the Epiphany quarter sessions, 1836, copies on paper, of the entries in the second book for the quarter preceding the quarter sessions respectively, were deposited with the clerk of the peace, and from and including the Easter quarter sessions 1836, up to and including the Epiphany sessions 1837, duplicates of the entries contained in the second, for the quarter preceding the last-mentioned quarter sessions respectively, have been prepared and signed by the justices, and deposited by them with the clerk of the peace. Annual abstracts of the accounts had been published, and since 1825 quarterly abstracts. The affidavits went on to give a history of a variety of transactions at the sessions, and between the treasurer and the two magistrates at whose instance the rule was obtained, and to shew that circumstances, of which the applicants were aware, had been suppressed, and that there were gross misrepresentations in the affidavits on which the rule was obtained.

Talfourd Serjt. *Thesiger* and *T. F. Ellis* now shewed cause. In order to support this rule for a mandamus the applicants must shew both that the books mentioned in the rule are the accounts passed by the Court of Quarter Sessions, and also, that if that be so, a mandamus lies to enforce the production of them. First: Assuming that the two books which are mentioned in the rule contain the accounts of the treasurer passed by the Court of Quarter Sessions, and ought to be deposited with the clerk of the peace—no mandamus lies in this case. Secondly: It is denied that the two books are the accounts which ought to be deposited. Thirdly: The affidavits on which the rule was obtained contain gross misrepresentation, and suppress a number of facts of which the applicants were aware.

No mandamus lies in this case. A mandamus is an order to perform some duty imposed by statute or common law, by virtue of some peculiar character; not to enforce simple common law rights between individuals, still less to compel a party to abstain from a tort. Here, the character of the treasurer is created by statute, and the only duty he can be required to perform is that imposed by the statute. No statute requires the treasurer to deposit with the clerk of the peace the books mentioned in the rule. The 12 *Geo. 2*, c. 29, s. 8, requires the treasurer to keep books of entries of the several sums respectively received and paid by him, and also to deliver an exact account, upon oath, if required, of all sums received and paid by him, and to lay before the justices the proper vouchers for the same. By the 8th section, after the accounts have been passed, all the accounts and vouchers are to be deposited with the clerk of the peace, but it is not said by whom they are to be deposited. It no where appears to be the duty of the treasurer to deposit them, and whose ever duty it is, it is clearly not his, for accounts cannot be passed till after he has delivered them in, when his duty is concluded. They cannot be deposited by the treasurer after he has delivered them in. It must be the duty of the

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First point:
 No mandamus
 will lie.

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person to whom he delivers them. It may, however, be said, that the treasurer is wrongfully in possession of what are the records of the sessions, that therefore he may be required to deliver them up. But a mandamus will not issue to prevent an individual from retaining what he has no right to keep. If Mr. *Payn* has performed all the positive duty imposed upon him by the statute, and if he is now wrongfully in possession of the books, he does not hold them in any public character, and he is a mere tort-feasor. No mandamus lies in such a case, *Rex v. The Commissioners of the Customs* (a). A mandamus is always to do some act in execution of law, and does not lie to compel a party to abstain from the abuse of the office he fills, *Regina v. Peach* (b). Again, a treasurer is a mere ministerial officer, and the Court will not grant a mandamus, in such a case. In *The King v. Jeyes* (c), and in *Rex v. Bristow* (d), and *Rex v. Johnson* (e), the remedy by indictment was treated as a sufficient and specific remedy. *Rex v. Jeyes* (c) was an application for a mandamus against a treasurer, to compel him to pay the costs of a prosecution, in obedience to the order of the judge of assize, under statute 7 Geo. 4, c. 64, ss. 22 & 23. The Court refused the mandamus, on the ground that the proper remedy was indictment, not mandamus. Lord Denman C. J. there said, "The first question is, whether this Court should interfere by that process in the case of an inferior officer, amenable to others. Before the case of *Rex v. Bristow* (d) an application was made for a mandamus against a treasurer in *Rex v. Shaw* (f); that case was, however, ultimately decided upon facts which do not occur here. In *Rex v. Bristow* (d), Lord Kenyon objected to descending too low, and put as an instance the case of a constable. We are not to carry the remedy by mandamus so far as to issue the writ wherever any officer has neglected his duty; this Court ought not to be called upon in every case of that

(a) See *post*, 536.

(b) 2 Salk. 572.

(c) 5 N. & M. 101; S. C. 3 A.

& E. 416.

(d) 6 T. R. 168.

(e) 4 M. & S. 515.

(f) 5 T. R. 549.

kind." So *Littledale J.* said, "In *Rex v. Bristow (a)*, Lord *Kenyon* clearly and distinctly lays down the principle, that a mandamus is not to be granted to compel a duty by an inferior officer. But *Rex v. The Treasurer of the County of Surrey (b)*, was upon an act precisely corresponding to that in the present case: there the Court refused the mandamus, and so therefore must we. I agree in the doctrine of these two cases: the treasurer is merely the servant of the magistrates. As to the case of *Rex v. The Commissioners of the Navigation of the Rivers Thames and Isis*, that falls within a class of cases in which the Court grants a mandamus. The writ there goes to the principal, who pays over in his public capacity. The present case is one of *a servant to the magistrates*." And *Patteson J.* said, "*Rex v. Shaw (c)* is a very early, if not the earliest case, where a mandamus was applied for against a treasurer, and it was refused, not on the ground of the treasurer being a ministerial officer, but because the foundation of the rule failed, the treasurer having already paid over the money, in obedience to authority which he could not resist. But afterwards, in *Rex v. Bristow (a)*, the Court decided against granting the writ, on the broad ground that the party applied against was a ministerial officer." The same rule is laid down by *Williams J.*

Now so far as respects the general nature of the office, the present case is identical with that of *Rex v. Jeyes (d)*, and the other cases there cited. With regard to the particular duty suggested, this case is much stronger than *Rex v. Jeyes*. In that case the treasurer, though in general the servant of the magistrates, was called upon to perform a duty independent of the magistrates. They had no power either to enforce or prevent the performance of the duty imposed on the treasurer by the statute. The payment was to be made to a third party. The treasurer was, therefore, to a certain extent, a principal. But here, if the treasurer has

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(a) 6 T. R. 168.

(c) 5 T. R. 549.

(b) 1 Chit. 650.

(d) 5 N. & M. 101; 3 A. & E. 416.

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any duty to perform, it is one which he owes to his masters—the magistrates. It is incumbent upon him, if at all, simply as an act of service to them. The principle of *Rex v. Jeyes* (a) is therefore applicable *à fortiori*. If the justices have improperly delivered these books to the treasurer, they may possibly be indictable, but the mandamus cannot go to their servant.

Secondly. The books mentioned in the rule are not the accounts which are to be deposited. It appears, from the 7th, 8th, and 9th sections of the 12 Geo. 2, c. 29, and the 18th section of the 55 Geo. 3, c. 51, that there are five different things contemplated by the two acts: 1st. The books of entries. 2dly. The accounts which the treasurer is to deliver in. 3rdly. The vouchers which he is to deliver in. 4thly. The discharge of the justices. 5thly. The yearly abstract of accounts. The applicants confound the books of entries with the accounts, for the purpose of obtaining this mandamus, and also with the yearly abstract of accounts, for the purpose of unjustly reflecting upon the character of the treasurer. It is not denied by the applicants, that these are the books which the treasurer has kept in compliance with the statute, and which the statute requires him still to keep. But it is said, that they are also the accounts passed. Now the accounts passed have, in fact, been deposited. The accounts can consist only of what the treasurer pays and what he receives. What he pays has been shewn and accounted for by the receipts and the tradesmen's bills. What he receives, by the gaoler's accounts and copies of the county rate. This may be an inconvenient mode of making out an account, but the statute requires no precise form. The justices, who are the only judges of the propriety of the accounts, have passed them in this form, and it appears that what was so passed is in fact deposited. If the justices acted unwisely in passing the accounts in this shape, that cannot convert the books which the treasurer is ordered to keep, into the accounts which he is ordered to deliver in. The justices have, it is true, compared

(a) 5 N. & M. 101; 3 A. & E. 416.

the books so kept with the accounts passed. That was for the purpose of signing the discharge in the books. They are compellable to give this discharge, and perhaps it would have been more convenient if they had given it separately. But this does not take away the treasurer's duty to keep the books, or his right to retain the discharges. The discharges are the only evidence that the treasurer has, that he or his father have performed their offices. In fact, the sureties which he must provide by statute have a right to require that he should not give up the discharges.

Thirdly. The affidavits on which the rule was obtained contain gross misrepresentation, and suppression of facts. If the assertions in the affidavits are material to the application, it must fail, because the facts are negatived. If they are not material, the Court will not sanction the irrelevant introduction of false charges. The Court has often laid it down, that where a rule has been obtained by misrepresentation, it must be discharged.

Lord DENMAN C. J.—The rule for a mandamus ought, in my opinion, to be made absolute. Either by mistake, or by some other means, the sessions and treasurer have both done wrong—the latter, in not seeing the accounts were deposited with the clerk of the peace, and the former in detaining them from him. I entirely disclaim entering in the least degree into the merits of the case. I do not know at all what the result of any inquiry would be. I think it highly probable, from the zeal displayed on this occasion, that this gentleman may feel that he has been hardly used. I do not enter upon that inquiry. It is enough for me to see there is a great public duty left unperformed, by reason of a public officer keeping back documents which he made out in that character and now detains. It is quite clear the book of entry was an account book. It is equally clear it was an account passed by the justices in session. The treasurer delivered it in. He had no right to take it away. The sessions had no right to place it in his hands, nor had he any

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right to keep it. The public are represented, not merely by the justices who happen to be present at any particular session, but by every justice of the peace of the county. The act of parliament gives every individual justice, at all times, a right to see all the accounts that are passed by the justices at sessions. This is an application made by the justices of the county to have the opportunity of inspecting accounts which were passed by the justices at session, and whatever their motives may be, and whatever may be the question between them and the treasurer individually, that right, we think, we are bound to enforce by mandamus. The book of entries was a book that was to be kept independently of the accounts, but it is quite clear it was treated as the accounts between the treasurer and the county. Is it then to be said that the public and the county are to be deprived of the opportunity of examining these accounts, because the treasurer chooses to have his vouchers written on those same accounts? That cannot alter the nature of them. I think it is quite a mistake to say that these are private books. They are public books. If he has written his accounts in books he had an interest in as a private individual, the fault is his own; and if he has put them in the book that belonged to his father's executors, he has done what he had no right to do with respect to them. He erroneously believes he has a right to keep the books, because they were improperly given back to him. I entirely disclaim any interference with the former cases. They are totally inapplicable. In *The King v. Jeyes (a)*, an order was made at the assizes, by the judge who tried the prisoners, that the expenses of a prosecution for a riot should be allowed to the prosecutor. The treasurer ought to have paid those expenses; but the treasurer is the servant of the sessions, and this Court will not place itself in the situation of the sessions, who ought to see that their servant does his duty. But in this case the sessions and treasurer have both committed a mistake. The sessions have

(a) 5 N. & M. 101; 3 A. & E. 416.

permitted the latter to detain the accounts, and have thereby prevented the public from obtaining a knowledge of what they have a right to know. Is it possible then to say that the two cases are similar? On the contrary, the sessions and the treasurer together have acted in such a way, that I feel it to be a duty which we owe to the public, to make this rule absolute.

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WILLIAMS J.—The only doubt which weighed with me was, whether or not, in granting this application, we should issue a mandamus to the right party. It was suggested that the mandamus should go to the sessions, as it was their duty, when the book was before them, to have kept it in their custody, and deposited it amongst their records. It was likewise said that the treasurer is an officer with respect to whom an indictment is a proper remedy; and when *The King v. Bristow* (a), and the other case referred to by my Lord, are examined, it will be found that in each there was an order for the payment of a sum of money, and by consequence, on disobedience of that order, an indictment would have lain. Lord *Kenyon*, in *Rex v. Bristow* (a), expressly grounds his judgment on that, as there was a remedy by indictment, and that a mandamus ought not to go. But how does the matter stand here? The Court of Quarter Sessions have returned the books to this gentleman. Have they jurisdiction to make any order on him after that? I am not prepared to say that they have. Then, if not, they are not the persons to whom the mandamus should issue. Is not this gentleman then the person? The books are within the precise language and meaning of the statute of *Geo. 2*. It is admitted that this gentleman has the books, and therefore, as he could not be indicted, there would be no remedy that I am aware of, except this writ of mandamus, and it therefore ought to be issued. Allusion has been made to the hardship upon Mr. *Payn*; but it is to be recollected that the books will be as safe in the records of the sessions as in Mr. *Payn*'s boxes, and he will have access to them.

(a) 6 T. R. 168.

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COLERIDGE J.—I am of the same opinion on all the three points. In the first place, as to these being the accounts, I think it is hardly possible to doubt for a moment that these really and truly are the *accounts* that he has kept. They are tendered by him as his accounts; they are received by the magistrates as his accounts; and the discharge is entered on these accounts. Mr. *Ellis* has said, that in truth he complied with the act which calls on him to deliver in true and exact accounts, when he delivered in what in fact were only the materials for the account,—that is to say, the sums which he ought to have received, which appeared on the face of the county rates—the tradesmen's bills, the gaoler's accounts, and the different vouchers he had for the sums he had paid. Those are the materials for the account; and the merely delivering in those certainly is not a compliance with the statute. By the account is to be understood that the party is not merely to throw at the heads of the magistrates all his bills, vouchers and papers; but he is to present them with a clear and true statement of the account of his receipts and payments. I have no doubt on that point. With regard to the last point made by Mr. *Ellis*, that this affidavit contained misrepresentations, and that material matters were suppressed,—if enough remains unanswered to justify the Court in making the rule absolute, we must proceed on those parts of the affidavits.

This is not a case of application for a criminal information, which is what I should have thought must have been in Mr. *Ellis*'s mind during the argument. We are now to say whether this public duty is to be performed or not by a public officer. The only circumstance which raised any difficulty in my mind was, whether or no mandamus was the proper course to be taken here. A great many cases have been cited. I think the result of those cases is nothing more than this,—that when the Court finds there is a public officer, who has a master, and who has received an order from that master, or from any public authority competent to issue the order, and the disobedience to that order may be punished by indictment, *then* this Court will not proceed

against him, who is merely a ministerial officer, by mandamus. It is not because the man is too low; it is because the character he fills is ministerial only, and that he has received an order from a competent authority, which he is bound to obey; and the Court then will leave the party to the common remedy by indictment. In this case the sessions, whose servant Mr. *Payn* is said to be, has issued no order, and there is no order on which an indictment could be found for disobedience. That, I think, distinguishes this case both from *The King* and *Bristowe* (a) and *The King* and *Jeyes* (b). In the former there was an order of sessions, and in the latter there was an order of the judge of assize. There being no existing order here, the question was with me, whether the first step should have not been for this Court to issue an order to the sessions to make an order upon Mr. *Payn*, which, if it had not been obeyed, might become the foundation of an indictment. I have considered that in my own mind; and I think it is a very doubtful question indeed whether this Court has authority to compel them to make such an order; but I entertain no doubt whatever that this Court has an authority to issue a mandamus to a public officer in possession of a public document, which a statute requires to be deposited in a particular custody. I cannot doubt for a moment the Court has a right to interfere, and say to that public officer, "Obey that statute, and put that public document in a place where it ought to be." That is precisely this case. This is a public, and not a private document. The moment Mr. *Payn* chooses to keep his public accounts in this book, which he was to render to the magistrates from session to session, or yearly or half-yearly, as it may be, and has taken his discharge in that book, he holds them as a public officer, and as a public officer he should deposit them in the proper place. I should extremely regret if what the Court is doing should be made the foundation for

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(a) 6 T. R. 168.

(b) 5 N. & M. 101; S. C. 3 Ad.
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any local triumph over him. No imputation was made against him, and in this Court we should never have heard of any against him, if it had not been stated, on the part of his counsel, that such was intended to be made; and certainly this Court does not proceed at all on the belief that any single charge against him has any foundation. As to any inconvenience to him, independently of this supposed misconduct, there is no inconvenience, because these documents are deposited in a place of public custody. The only use of them to him is, they are his discharges under the statute, and he will always have a right to have access to them, or their production, whenever his interest requires.

Rule absolute.

The KING v. The COMMISSIONERS OF THE CUSTOMS (a).

1. The Commissioners of Customs refused to deliver up certain tobacco, claimed as wrecked goods, and upon which a duty of 5*l.* per cent. had been tendered, and the Court refused to grant a mandamus to compel them to do so, as there was another remedy.

2. A mandamus will not in such a case be issued, because it would be issuing a mandamus to the King; per *Littledale J.*

A Rule nisi had been obtained for a writ of mandamus, directed to his Majesty's Commissioners of the Customs, commanding them to deliver a certain quantity of tobacco to the applicant, Mr. *Legge*.

A quantity of tobacco had been imported into London, and was landed and warehoused in a bonding warehouse. The duty was not paid, and the owner executed a bond conditioned for the conveyance of the tobacco to Londonderry, and the payment of the duties there. The tobacco was accordingly shipped on board a vessel, to be carried to Londonderry. The vessel was wrecked, and part of the cargo being saved, was taken possession of by the custom-house officers. Ordinarily, tobacco is admissible upon a rated duty as specified in the schedule of the act, but the owner claimed these goods as wrecked, stranded, or cast on shore, upon which a duty of 5*l.* per cent. only is payable. The 5*l.* per cent. duty was tendered to one of the custom-house officers, but he, acting under the order of the

(a) This case was argued in Trinity term last.

Commissioners of Customs, refused to give up the tobacco unless the higher duty was paid. The lesser duty was subsequently paid into the treasury by Mr. *Legge*. Whether the lesser or higher duty was payable, depended upon the construction to be put on the 3 & 4 Will. 4, c. 52, ss. 49, 50, 51.

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Sir *J. Campbell* A.G., (and *T. F. Ellis* was with him), in Trinity term, shewed cause against the rule. This mandamus ought not to issue, for assuming that the party has a right to the tobacco, he has another remedy for the wrong done to him. He may either bring an action of trover or replevy the goods. It is laid down in the note to *Selwyn's* N. P. p. 1172, that replevin may be brought in any case where a man has had his goods taken from him by another. In this case the higher duty was payable. The expression in the statute, "goods wrecked," applies to *wreckum maris*.

The COURT called on *Jervis* to support the rule for the crown.

Jervis contra. These goods are in the hands of the crown, and trover is not maintainable. If there be any other remedy, it is only by petition of right. Neither the King, nor the collector as his officer, can be sued. [*Littledale* J. Can we issue a mandamus to the King?] A mandamus may be issued to an officer of the crown, who neglects to perform his duty. The goods were in the first instance rightfully deposited in the King's warehouse, but we are now entitled to have them out, having tendered the lesser duty, and having actually paid it into the treasury. [*Patteson* J. Assuming you have the legal right, can you not bring an action?] The King has possession of the goods by his ministerial officers. The lord of the manor might have maintained an action, because no duty was payable from him. [*Lord Denman* C. J. An action is the better remedy, as you may get damages.] We will bring an action if the Attorney-General will not take the objec-

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tion. An action is not maintainable, as the act is a mere omission, a nonfeasance. Neither trover nor assumpsit is maintainable. The cases referred to by the Attorney-General, are where there has been an illegal seizure of goods. Here the goods are regularly placed in the King's warehouse in the first instance. If the goods had come into port in the usual manner, on tendering the duty we should have been entitled to have a delivery order. We only want the order. [Lord *Denman* C. J. If they improperly refuse to give you that document, that is another question, but that is not the present application.] We have done all we can do.

LORD DENMAN C. J.—It does not appear to me that the question with respect to the construction of the act of parliament is properly before us. Either the custom-house officer had or had not authority. If he had not, an action may be maintained against him.

LITLEDAL J.—There is no doubt that the general rule is, that where a party has no other remedy for a legal right a mandamus may be issued. But this is in fact an application to issue a mandamus to the crown, as the custom-house officers are only the servants of the crown, which cannot be.

PATTESON J.—Mr. *Jervis* says that the lesser duty was tendered to the custom-house officers, and that all they were bound by the statute to pay has been paid into the treasury, and that that is the same as if it had been paid to the subordinate officer. But then Mr. *Jervis*'s client must require the necessary document. If that is refused an action will lie.

WILLIAMS J. concurred.

Rule discharged.

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of YORK.

Tuesday,
January 31st.

THIS was an appeal against a poor's rate, made the 20th March, 1834, for the township of Heworth, in the North Riding of the county of York, and afterwards duly published and allowed, by which the appellants were assessed in the following terms: viz.

Rental and Assessment.		
The mayor and commonalty of the city } of York, Monk Ward Stray, . . . }	£177	£5. 18s.

The appeal was tried at the Epiphany general quarter sessions for the said North Riding, in 1835, when that court confirmed the rate, subject to the opinion of the Court of King's Bench on the following case :

act, commissioners were empowered to extinguish the right of stray, and to assign a portion of the moor in lieu thereof to the mayor and commonalty of the city of York, free of all manorial rights, to be exclusively enjoyed by such freemen of the city as were before entitled to the right of stray, and in the same manner as the right of stray was enjoyed. The commissioners, by their award (16th January, 1832), set out to the mayor and commonalty 117 acres, 3 roods, and 20 perches. At the wardmote of the mayor and aldermen, certain officers called pasture-masters are appointed, who are subject to other officers, called wardens, of whom the lord mayor was always one, the others being three of the aldermen. The pasture-masters regulated the enjoyment of the stray, and directed the repair of bridges and gates, and appointed a herdsman; and the wages of the herdsman, and all other necessary expenses, were paid by means of annual sums paid by each freeman for each head of cattle depastured. The pasture-masters rendered an account to the wardens. The freemen of Monk's Ward, since the acts and the inclosure, have had the exclusive enjoyment of the land in question, subject to the regulations of the wardens and pasture-masters. The mayor and commonalty received no money on account of the stray, nor turned any cattle thereon, nor derived any benefit in their corporate capacity, nor in any other manner, except as any of them might be entitled as freemen of Monk's Ward. During several years subsequently to the passing of the act, large expenses were incurred by the pasture-masters in the necessary annual expenses in maintaining and improving the same, and for the purpose of raising funds, the wardens and pasture-masters let portions of the allotted lands, and received about 2000*l*. In 1826, the pasture-masters having a large balance in hand, laid out 498*l*. in the purchase of 5 acres of old inclosed land. In 1826, this land was conveyed by lease and release to the wardens and pasture-masters, and their heirs, as trustees for the freemen, and for their exclusive enjoyment. The 5 acres were accordingly added to, and now form part of Monk's Ward Stray. 279*l*. was also expended by the pasture-masters in building a cottage for the herdsman. In auditing the accounts of the pasture-masters, by the wardens, the balance has generally been in their favour, though in two or three years, on account of the extraordinary expenses, it was not; but in either case the balance has always been carried forward to the account of the succeeding year. The land would let for 250*l*. a year, and about 200 head of cattle were turned on: Held, that the mayor and commonalty were to be considered in the occupation of the whole of the land, except the 5 acres, and for those they were not rateable.

Before the passing of a statute in 1817 (57 Geo. 3), the freemen of the city of York, who were occupiers of houses in Monk's Ward, were entitled to the right of stray over Heworth Moor, of which certain persons in the act named were seised in fee. By the

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The lands called Monk Ward Stray, consist of 131 acres and 38 perches of land, situate near the city of York, and in the township of Heworth.

Before the passing of an act of parliament in 1817 (the 57 Geo. 3), the freemen of the city of York, who were occupiers of houses within a certain division or ward of the said city, called Monk Ward, were, together with certain other persons, entitled to a common of pasture and right of stray or average, and had immemorially used and employed the same in and over a certain parcel of ground called Heworth Moor, of which *G. A. T.* esq., lord of the manor of Heworth, was then seised in fee; and also in and over a certain other farm or piece of land called Heworth Grange, of which the king was then seised in fee; and also in and over certain closes and other parcels of ground called Hall Fields, the Groves Turnstile Close, and Margery Close, of which *E. P.* esq. and others were then seised in fee.

By the said act, commissioners were appointed and authorized to settle the value of the right of stray and average, and to award, assign, set over, and allot (amongst others) to the mayor and commonalty, so much and such parts of the parcels of grounds respectively as should be a compensation and satisfaction for the rights of stray and average of the freemen; and from and after the execution of the award of the said commissioners, the right of stray and average should cease and be for ever extinguished, and the said part or parts so to be awarded, assigned, allotted, and set out to the mayor and commonalty, should be thereafter held by them, exclusively of any manorial rights or interests whatsoever of *G. A. T.* and the other owners and proprietors before mentioned, to be exclusively enjoyed by such freemen of the city residing in Monk Ward as aforesaid, as for the time being would have been entitled to right of common, stray or average, in and over the several parcels of land, in case the act had not been passed, and for such and the like cattle, and under such and the like regulations and restrictions as such freemen respectively did or were

entitled to enjoy the same. By another act of parliament passed in the following year, 1818 (the 58 *Geo.* 3), the commissioners were further authorized and required to lay out and apply certain surplus monies arising from the exoneration of the several parcels of land, the subject of the inclosure, from the right of common, stray or average, to the purchase of a further allotment to the mayor and commonalty, to be for ever exclusively enjoyed by such freemen as aforesaid, in the same manner as their previous rights of stray or average had been held and enjoyed.

The commissioners by their award, bearing date the 16th day of January, 1822, and duly made and published in pursuance of the said acts, did award and allot unto the mayor and commonalty, to be exclusively enjoyed by such freemen of the city residing in Monk Ward as aforesaid, as for the time being would have been entitled to right of common, stray or average, in and over the several parcels of grounds by the acts intended to be allotted, in case the same had not been passed, and for such and the like cattle, and under such and the like regulations and restrictions as such freemen respectively did or were entitled to enjoy the same, the following allotments, viz.

	A.	B.	P.
An allotment from the common, containing	68	3	0
Another do.	18	0	18
Another do.	31	0	0
As purchasers from the devisees of Thomas Withors .	8	1	20
	<hr/> 126 0 38 <hr/>		

The city of York is divided into four wards, of which Monk Ward is one. The freemen of each of the other wards respectively have rights of common or stray and average over certain other several parcels of land situate near the said several wards respectively, in the same manner as the freemen of Monk Ward had and have over the lands in question.

By the ancient and immemorial custom of the city of York, a wardmote court of the lord mayor and aldermen

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is held annually, at which court four officers are appointed for each ward, who are called pasture-masters, and who adopt and enforce the necessary restrictions and regulations under which the freemen of the several wards exercise their respective rights of stray and average.

The pasture-masters perform the duties of their office with the assistance and under the superintendence of certain other officers called wardens. The lord mayor and aldermen are ex officio wardens of the wards, and the custom is, for three of the aldermen to act as wardens of each of the said wards severally, the lord mayor being, during the year of his mayoralty, a warden of all the wards. In matters of more than ordinary importance, relating to the several rights of stray, reference is made by the several wardens to the select body of the corporation, called the Upper House, and consisting of the lord mayor, aldermen, sheriffs, and those who have been sheriffs, who possess a general control over the wardens and pasture-masters with respect to the several rights of stray.

Pasture-masters have accordingly been annually appointed for Monk Ward since the passing of the acts of parliament, in the same manner as before, who, together with the wardens of Monk Ward, have, both before and since the acts and inclosure, appointed a person to be herdsman. The pasture-masters direct all the repairs of gates, fences, bridges, and the like. The herdsman's duties are to look after the cattle of the freemen, impound any found trespassing or depasturing contrary to the regulations and restrictions adopted by the pasture-masters, and to prevent cattle straying, and the like. The herdsman resides on the lands, in a cottage built for him thereon by the pasture-masters, and for which the herdsman, in all assessments previously to the one in question, has been assessed to the poor-rates, but these assessments have invariably been paid by the pasture-masters for the time being.

The wages of the herdsman, and all other necessary expenses attendant upon the care and management of the

Monk Ward Stray, were before, and are since the passing of the acts of parliament, and the inclosure, defrayed by means of an annual sum paid by such freemen of the ward as aforesaid, for each head of cattle depastured; the amount of the sum so paid has always been from time to time fixed by the said pasture-masters, and paid to them by the freemen. That sum has varied according to the amount of the annual expenses, from 7*s.* to 15*s.* for each head of cattle per annum, but during the year 1834, and for the six or seven years preceding, 10*s.* only has been paid annually for each head of cattle turned upon Monk Ward Stray, by the freemen to the pasture-masters.

The said pasture-masters have always rendered every year an account of their receipts and disbursements in respect of the Monk Ward Stray to the wardens of the ward, by whom such accounts have been regularly audited. The wardens themselves do not either receive or pay any money whatsoever on account of the Monk Ward Stray, nor turn any cattle thereon, nor derive any benefit whatsoever therefrom, nor do the mayor and commonalty of the city of York receive any money whatsoever on account of the Stray, nor turn any cattle thereon, nor derive any profit or benefit whatsoever therefrom in their corporate capacity, nor in any other manner, except as any of them may be entitled as such freemen of Monk Ward as aforesaid.

During several years subsequently to the passing of the acts and the inclosure of the allotted lands called Monk Ward Stray, large expenses were incurred by the pasture-masters in the necessary annual expenses of maintaining and improving the same, for the exclusive enjoyment of the freemen; and for the purpose of raising funds requisite for such expenses, without imposing heavy burdens on the freemen, the wardens and pasture-masters did from time to time lease certain portions of the allotted lands to different persons for short terms of years, at adequate rents reserved to them the wardens and pasture-masters; but no such leases have existed since 1829, the rents so reserved and

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received during the existence of the leases amounting in the whole to at least the sum of 2000*l.*; and all other monies received by the pasture-masters on account of the Monk Ward Stray have been laid out in the necessary annual expenses of maintaining and improving the Monk Ward Stray, except that in the year 1826 the pasture-masters having a balance in hand exceeding 1000*l.*, which did not seem to be then wanted for those purposes, the sum of 498*l.*, part of it, was laid out in the purchase of about 5 acres of old inclosed land belonging to Mr. *Peter Theakstone*, and lying contiguous to Monk Ward Stray, in the township, which 5 acres were accordingly conveyed by indentures of lease and release, dated the 27th and 28th September, 1826, to the individuals who were at that time wardens and pasture-masters of Monk Ward, and to their heirs, as trustees for the freemen, and for their exclusive enjoyment; and the said 5 acres were accordingly added to, and now form part of Monk Ward Stray, and are enjoyed by the freemen in the same manner as the rest; and also the sum of 279*l.*, other part of the balance, was expended in building a cottage for the herdsman, and in erecting a penfold upon and for the purposes of the said Monk Ward Stray.

Before the acts of parliament and inclosure, neither the mayor and commonalty, nor the pasture-masters or wardens, nor the freemen of Monk Ward Stray, nor any other persons, were ever rated to the poor in respect of the common of pasture and rights of stray or average over the lands, the subject of the acts and inclosure, nor were such parts as formed the open and uninclosed common called Heworth Moor, from which the said 117 acres, 3 roods and 18 perches were allotted to the corporation, and now forming part of Monk Ward Stray, ever the subject of rate, but the allotment of 8 acres, 1 rood, and 20 perches to the mayor and commonalty, as purchasers from the devisees of *Thomas Withers*, was rated and paid rates to Heworth township previously to the purchase and allotment.

Since the acts and inclosure and allotment, no rate has ever been paid to the township in respect of Monk Ward Stray, by either the mayor and commonalty, or the wardens or the pasture-masters, or the freemen of Monk Ward, but during the continuance of the leases above-mentioned, the lessees or occupiers thereunder for the time being were assessed towards the relief of the poor in Heworth township, the rates in respect thereof being always paid by the pasture-masters, and also the 5 acres purchased of *Peter Theakstone*, as above-mentioned, were, previously to the purchase, rated and paid rates to Heworth township.

The freemen of the city of York, who are occupiers of houses within Monk Ward, have, since the acts and inclosure, had in the manner above-mentioned, the exclusive enjoyment of the lands in question so allotted and purchased as aforesaid, called Monk Ward Stray, subject to the same restrictions and regulations under which they previously exercised and enjoyed their rights of stray or average, so far as the same restrictions and regulations were not rendered inapplicable by the inclosure, and in the exercise and enjoyment of the rights, the freemen did, during the year 1834, turn upon the Monk Ward Stray their cattle, to the number of 200 head.

In auditing the accounts of the pasture-masters by the wardens, the balance has generally been in their favour, though in two or three years, on account of the extraordinary expenses, the balance has been against them, but in either case the balance has always been carried forward to the account of the succeeding year.

The ordinary expense of the care and management of Monk Ward Stray does not, however, at present exceed 50*l.* a year.

The lands adjoining Monk Ward Stray, and before the inclosure forming part of Heworth Moor, have, since their inclosure, let at rates varying from 3*l.* to 5*l.* an acre, as the same are remote from or near to the city of York; and the 131 acres, 28 perches of land, comprised in Monk

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Ward Stray, are, as pasture land, worth to let by the year from 27s. to 3*l*. an acre, and would, in their present condition, let for an entire rent of at least 250*l*. by the year; but the right of common of pasture, and right of stray or average, exercised by the freemen over Monk Stray, by turning on yearly about 200 head of cattle, is worth, for every head of cattle, to each freeman turning upon the same, at least 2*l*. by the year.

The questions to be submitted to the Court of King's Bench are,

First, whether, under the circumstances above stated, there is such a beneficial occupation of the lands called Monk Ward Stray, or any part thereof, in the mayor and commonalty of the city of York, as to render them liable to the rate.

Secondly, if there be such a beneficial occupation in the mayor and commonalty, in what amount ought they to be rated.

This case was argued in last Michaelmas term (a).

Cresswell and *Alexander* in support of the order of sessions. This is an occupation by the mayor and corporation of York, for they occupy the land by the freemen in Monk Ward. The acts of the wardens are the acts of the corporation, and so of the pasture-master and the other servants of the corporation. The fee-simple is in the corporation. It is true that the freemen have an exclusive right; but that is only to a right of common. This is within the principle of the cases of *The King v. Churchill* (b), *The King v. Sudbury* (c), and *The King v. Tewkesbury* (d). In *The King v. Churchill*, the burgesses of Nottingham, and the occupiers of ancient messuages there, had, as such, for a certain portion of the year, a right to turn cattle into certain fields, and to exclude, during that period, the owner

(a) Before Lord Denman C. J., 750.
Patteson J., *Williams J.*, and
Coleridge J.

(c) 2 D. & R. 651; 1 B. & C. 389.

(b) 6 D. & R. 635; 4 B. & C.

(d) 13 East, 155.

of the soil. It was held that the freemen were possessed merely of an incorporeal hereditament, a right of common by prescription, which was not rateable. In *The King v. Sudbury* (a), it appeared that the corporation were seised in fee of certain pasture lands, and appointed a ranger to keep the keys of the gates, clean the ditches, preserve the fences, and impound cattle trespassing thereon, and at a court held annually, they made regulations concerning their pastures, the number of cattle each burgess was to turn on, and the sum to be paid in respect thereof; which money, after deducting the expenses of management of the land, was distributed among the burgesses who did not turn on. It was held they were the beneficial occupiers of these pastures, and were consequently liable to be rated to the relief of the poor. In *The King v. Tewkesbury* (b), an act of parliament had vested the aftermath of a certain meadow in trustees for the burgesses and principal householders of Tewkesbury. The trustees had power to demise for the best rent, or to let in pastures for cattle. The trustees let in pastures, at so much a head, for cattle. It was held that the trustees must be taken to be the occupiers of the land, and were consequently rateable for it. Here the corporation are the trustees for the freemen. *The King v. Sudbury* (a) shews decisively that the freemen cannot be considered to be in the occupation of the soil. Can it be said that their right lies in livery? The freemen have nothing more than the exclusive right of pasturing. They are subject to the control of the officers of the corporation. It is clear, then, the freemen are not rateable. If any one is rateable, it must be the corporation. *The King v. Watson* (c) will probably be cited; but in *The King v. Sudbury* (a), Bayley J. said, "This case falls within the principle of the decision in *Rex v. The Trustees for the Burgesses of Tewkesbury* (b), and is distinguishable from *Rex v. Watson* (c). If

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(a) 1 B. & C. 389; 2 D. & R. 651.

(c) 5 East, 480.

(b) 13 East, 155.

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it were necessary to over-rule either case, I should adhere to the decision pronounced in the former case, which seems to me to furnish a more reasonable rule of construction than *Rex v. Watson* (a)."

The occupation by the corporation is a beneficial one. They have imposed a sum of 10s. on each head of cattle, and this money they have received and disposed of at their pleasure. It is said that the corporation do not receive the money. It is, however, paid to the pasture-masters, who are their officers, and it is the same as if it was paid to them. It is much more convenient that the rate should be imposed on the corporation rather than on the freemen.

Bliss, contra. It is doubtful whether the appellants are the actual occupiers; but if they be, their occupation is clearly not beneficial. As to the actual occupation, the land is not all in the same predicament. To prove them occupiers of the 5 acres purchased of *Theakstone*, no argument is suggested that is not equally applicable to the 126 acres; but the argument most insisted on for the 126, viz. the title being in the corporation, has no application to the 5 acres, but, on the contrary, is as good to prove the trustees occupiers of the 5 acres as the corporation occupiers of the 126. All the other arguments and circumstances to prove an occupation are insufficient, apart from the title, because they all existed in the same force as to the 126 acres, in 1816, when the corporation must be admitted to have had neither title nor occupation. These 5 acres, therefore, at all events, should be struck out of the rate. As to the actual occupation of the 126 acres, the acts of parliament and the award may have made the freemen householders of Monk Ward tenants in common, from year to year, of the sole and separate pasture, which is an occupation; *Rex v. Watson* (a). The judgment in *Rex v. Churchill* (b) turned upon the burgesses and householders

(a) 5 East, 480.

(b) 6 D. & R. 635; S. C. 4 B. & C. 750.


having only a right of common, and not a sole and separate pasture, which they, not having succession, could not by the common law have prescribed for. That difficulty does not exist here; for an express statute has given the former commoners the exclusive enjoyment of the pasture, extinguishing the rights of all others.

As to the beneficial occupation. The rule to be collected from all the cases seems to be this:—that where the occupier actually receives the profits, either for his own use or the private use of others, though he have no interest in them himself, he is rateable: as in *Rex v. Tewkesbury* (a), *Rex v. Sudbury* (b), *Rex v. Agar* (c), *Rex v. St. Giles, York* (d). But no occupier is rateable who does not actually receive the profits himself, and to an extent exceeding the expenses of care and management. As, if there be no profits, *Rex v. Bedworth* (e); or if the benefit or profits be immediately enjoyed by others; *Rex v. Waldo* (f), *Rex v. Woodward* (g), *Rex v. St. Lukes* (h), *Rex v. St. Bartholomew the Less* (i): which cases depend neither upon the ground of charity, for even alms folk are not therefore exempt from rates; *Rex v. Munday* (k), *Rex v. Green* (l); nor upon the appropriation of the profits to any public purpose, which must be by act of parliament, and for all subjects generally, in order to create an exemption; *Rex v. Salters Load Sluice Navigation* (m), *Rex v. Liverpool* (n). In these cases also the occupiers had some benefit from the tenements, for their servants resided there; but this being only for care and management, does not form the subject of rating; *Rex v. Joddrell* (o), and the cases there cited.

- (a) 13 East, 155.
- (b) 2 D. & R. 651; S. C. 1 B. & C. 389.
- (c) 14 East, 256.
- (d) 3 B. & Ad. 573.
- (e) 8 East, 387.
- (f) Cald. 358.
- (g) 5 T. R. 79.
- (h) 2 Burr. 1053; 1 W. Bl. 349.

- (i) 4 Burr. 2435.
- (k) 1 East, 584.
- (l) 4 Mann. & R. 164; 9 B. & C. 203.
- (m) 4 T. R. 730.
- (n) 9 D. & R. 780; 7 B. & C. 61.
- (o) 1 B. & Ad. 408.

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The facts found by the sessions bring the present case fully within this rule. It is expressly found that the corporation derive no benefit whatever from these lands. The special facts stated are to be qualified by this finding. But those special facts, even independently, are no evidence of a beneficial occupation. It can never be held that the enjoyment of these freemen is the enjoyment of the corporation. The corporation is not seised to its own use. It can neither put cattle on the land, nor authorize others to do so; as in *Rex v. Sudbury (a)*, and *Rex v. Tewkesbury (b)*. All freemen are not commoners, but only a portion, who are householders in a particular ward. These individuals are not the body corporate, nor do they hold or enjoy by its permission, or in its name and stead, but by a paramount right, and exclusive of the body corporate as well as all others. If the corporation be seised of any lands for a charitable use, as in *Rex v. St. Luke's (c)*, it could have been said with more reason that the enjoyment by the charitable objects is the enjoyment by the corporation. The head-money or annual payment to the pasture-masters is not agistment money, or the hire and price for enjoyment, but is in its origin and character a corporate regulation, for the more convenient enjoyment of the freemen, and depends for its authority on the custom only, not on any proprietary title or occupation of the corporation. The powers also and duties of the pasture-masters and other officers, rest upon the same foundation. For the same payments are made and powers exercised through the other wards of York, where there appears no question of title or occupation; the same are still made and exercised over the 5 acres, where it does appear there can be no title; and the same were formerly held and exercised over the 126 acres, in which it appears that till 1817 the corporation could have had neither title nor occupation. The annual payments therefore are no return of profits from the lands, but a customary collection

(a) 2 D. & R. 651; 1 B. & C.
 389.

(b) 13 East, 155.

(c) 2 Burr. 1053; 1 W. Bl. 249.

in advance to defray the costs of care and management, which they neither can by law nor do in fact exceed; and consequently are by their nature and amount exempt from rates.

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With regard to the balance in hand in 1826, arising from leases then granted:—During their continuance there was of course a beneficial occupation in somebody, and then rates were paid. But that balance has been all expended, and all, with the exception of the purchase of the 5 acres, in the necessary care and management; and as the leases expired in 1829, those circumstances can have no effect to prove a beneficial occupation of the corporation in 1834: for both the leases and the purchase were unauthorized acts, uncommanded by the corporation, unwarranted by the custom, unsanctioned by the statutes of allotment, and can never be repeated. In *Rex v. St. Giles, York* (a), the balance was still accumulating, and accrued by acts within the power of the trustees to do. As to the balance of 50*l.* now in hand,—even if this were the clear profits, the rate must at least be reduced to that amount. But this balance is of the same nature as the annual payments from which it accrued. A balance must be taken *communibus annis*. *Rex v. Hull Dock Company* (b). It is not every year against the corporation, but sometimes in their favour, and in either case is carried forward to the next year's account, and expended for care and management. If there continue to be a surplus, the head-money will, by the custom, be reduced. In the instance of houses, there must be always a balance accumulating a fund for renewal; but that fund is not rateable; *Rex v. Joddrell* (c).

The present is like an attempt to rate the lord of a manor for the rights of common in his customary tenants over his waste; whereas a deduction equal to that burthen ought to be made from his rate; *Kempe v. Spence* (d). And where the rights of others over an occupier's land eat up

(a) 3 B. & Ad. 573.

(b) 5 M. & S. 394.

(c) 1 B. & Ad. 403.

(d) 2 W. Bl. 1244.

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the whole benefit, he is not rateable at all; *Lord Butc v. Grindall* (a). Here it is found that the land would let for 250*l.* a year, but that the rights of common are worth 400*l.* a year. Every thing in the case negatives the existence of any possible benefit over and above the rights of the commoners.

The rule for ascertaining the rateable amount, where the owner is occupier, is to inquire what a tenant would give to occupy in the same manner, and subject to the same burthens: *Rex v. Lower Mitton* (b), and that class of cases. Suppose the corporation were to demise this land, what rent could a tenant be found to give? The householders of Monk Ward would still have their rights of common; and the tenant would perhaps not get their head-money, for that is due only by the custom of the corporation, and the custom is not demisable; but even if he did get those payments, he could only claim them to the amount of the necessary expenses of care and management, for the custom extends no further. The only profits of this land are the pasture: of that pasture the commoners have the exclusive enjoyment, by the statute; subject to that enjoyment, what rent could the corporation get for this land from a tenant?

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court as follows:—

From the statement of the case it appears in substance that before the passing of an act of parliament in 1817 (57 *Geo.* 3), the freemen of the city of York, who were occupiers of houses in one of the wards called Monk Ward, were entitled to the right of stray and average over a parcel of ground called Heworth Moor, and some other parcels of ground, of which certain persons in the said act named were seised in fee. And by the said act commissioners were empowered to extinguish the said right of stray and

(a) 1 T. R. 338.

(b) 4 Mann. & R. 711; 9 B. & C. 810.

average, and to assign in lieu thereof a parcel of land to the mayor and commonalty of the city of York, free of all manorial rights, to be exclusively enjoyed by such freemen of the said city as were before entitled to such the right of stray and average before mentioned, and in the same manner as the said right of stray and average was enjoyed. The said commissioners, by their award bearing date the 16th January, 1822, did accordingly set out to the said mayor and commonalty 117 acres, 3 roods, and 20 perches, which, together with 8 acres, 1 rood, and 20 perches, and 5 acres, (which fall under a different consideration from the rest,) amounting to 131 acres and 28 perches of land, form the subject of the present rate. These lands, it is stated, are worth 250*l.* a year to let, but in the exercise of the said right of stray and average by the said freemen, 200 head of cattle are yearly turned on the said lands, and the right in respect of each head of cattle is worth 2*l.* a year. It must be observed therefore in passing, that there exists in this case property clearly rateable in its nature, although it may still turn out, upon the further examination of the case, either that no person is rateable, or, as has been contended, that at all events the mayor and commonalty are not rateable. It further appears from the statement, that for the regulation of the rights of the freemen of Monk Ward officers are appointed at the wardmote of the mayor and aldermen, called pasture-masters, who are themselves subject to other officers, called wardens, of whom the lord mayor is always one, the rest being aldermen. Then follows the statement upon which the whole question turns,—“that the said mayor and commonalty receive no money on account of the said stray, nor turn any cattle thereon, nor derive any benefit in their corporate capacity, nor in any other manner, except as any of them may be entitled as such freemen of Monk Ward as aforesaid.”

Founded upon this statement, the argument addressed to us has been, that whatever may be the case with the individuals deriving benefit from turning cattle on the lands in

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question, the corporation is not rateable : and in support of it various cases have been cited, which, whether distinguishable from the present or not, (we think they are,) furnish instances of exemption from rateability. The cases referred to were *Rex v. St. Luke's Hospital* (a), *Rex v. Field* (b), *Rex v. St. Bartholomew's Hospital* (c), *Rex v. Waldow* (d), *Lord Amherst v. Lord Somers* (e), and *Rex v. Salters Load Sluice Navigation Company* (f); to which latter might have been added *Rex v. Sculcoates* (g), *Rex v. Liverpool* (h), and *Rex v. Trustees of the River Weaver* in a note to the same case.

Of these cases the last mentioned seem to have the strongest bearing upon the present; the others very slightly, if at all, resembling it. The hospitals and the charitable institutions, which were the subject of consideration in the cases first alluded to, are wholly distinguishable from one where, beyond dispute, rateable property is beneficially occupied. In *The King v. St. Luke's Hospital* (a) and *The King v. Field* (b), an attempt was made to rate persons occupying apartments, for the purposes of the establishment in each instance, but the attempt failed, with some warmth of expression on the part of Lord Kenyon in the latter case, because the residence of the persons being necessary, and there being no accommodation beyond that necessity, it must be considered on the same footing as that of the unhappy inmates in the one case, and the charity children in the other. The cases of *Rex v. St. Bartholomew's Hospital* (c) and *Rex v. Waldow* (d), fall under the same consideration. In the case of *Lord Amherst v. Lord Somers* (e) the only point decided was, that the occupation of property for the public service cannot become the subject of a rate; and such was the case there, because the property in question (stables) was applied to the use of a regiment of horse

(a) 1 Bott, 132, 5th ed.; 2 Burr. 1053.

(b) 5 T. R. 587.

(c) 1 Bott, 139; 4 Burr. 2435.

(d) 1 Bott, 166; Cald. 358.

(e) 2 T. R. 372.

(f) 4 T. R. 730.

(g) 12 East, 40.

(h) 7 B. & C. 61; 9 D. & R.

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guards exclusively, the plaintiff not having had a single horse kept in it. It is to be observed, however, that when in any case the accommodations are more than requisite for the due performance of public duty, such extra occupation is rateable: *Rex v. Terrott* (a).

The case of *Rex v. Sutters Load Sluice Navigation Company* (b), which is the foundation upon which the others above referred to rest, if this subject had now for the first time been considered, might have created some doubt in the present case: for it is certainly true that Lord Kenyon in his judgment, and indeed very much as the reason for it, relies upon the fact that the parties rated "were bare trustees, without any interest," and he refers to the case of *Rex v. St. Luke's Hospital* (c), as similar in principle. The cases of *Rex v. Inhabitants of Liverpool* (d) and *Rex v. The Trustees of the River Weaver* (e), may be considered as depending upon that case. In *Rex v. Sculcoates* (f) there was the further difficulty, that no profit appeared to arise in the place where the rate was imposed. In these cases, however, the tolls or dues received were, by the acts of parliament, in each case directly applied to certain specific purposes, and diverted from the control and management of the trustees. Neither the trustees or anybody else derived any benefit from the money received. They, therefore, (the trustees) in each of those cases neither derived any benefit, nor could be considered as trustees for others who did;—a circumstance which distinguishes those cases from this now under consideration.

But if the authorities to which we have lastly been referring had borne more directly upon the present case, and had admitted of still less distinction, it would have been impossible to have acted upon them without overturning others, equally well considered, as we think, and decided upon this very subject. And we are clearly of opinion, when we bear in mind the importance of abiding by those decisions, when

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(a) 3 East, 506.

(b) 4 T. R. 730.

(c) 1 Bott, 132; 2 Burr. 1053.

(d) 9 D. & R. 780; 7 B. & C. 61.

(e) 9 D. & R. 788.

(f) 12 East, 40.

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once made and recognized, so that a corresponding practice may probably have grown up through the country, and, moreover, consider the ease and convenience of this mode of rating, when compared with the assessment of the individuals benefited, that we ought not, except under the pressure of the strongest arguments and the clearest reasons, to depart from what has been decided and done already. We shall doubtless be understood as now alluding to the cases of *Rex v. The Trustees for the Burgesses &c. of Tewkesbury* (a), and *Rex v. Mayor &c. of Sudbury* (b), cited in the argument, and from which we think the present case cannot substantially be distinguished. In the former case the rate was imposed upon the trustees of the Severn Harn, a meadow in the borough of Tewkesbury, over which, before the passing of an act of 48 Geo. 3, the burgesses and certain occupiers within the borough had a right of common for a portion of the year. By the said act this right was suspended, and the aftermath, over which the said right had been exercised, was vested in trustees, who were empowered to let the aftermath, and they had taken in cattle to agist at so much a head. The profits were to be divided amongst those persons who would have been entitled to right of common before the passing of the act. The trustees, therefore, in that case, received no benefit; but this Court held that they were properly rated.

In the latter case the rate was upon the mayor, aldermen and burgesses of Sudbury, in respect of a piece of pasture land, called Portman's Croft. There also, as in the present instance, the land was vested in the corporation, and the enjoyment of it resembled, in many particulars, what takes place with respect to the land in question. Persons entitled to turn on cattle paid a stipulated fine, according to regulations from time to time made, for each head of cattle. This payment was made to the treasurer of the corporation, and the profits, after deductions, were distributed among poorer burgesses, who had, but did not, on account of

(a) 13 East, 155.

(b) 2 D. & R. 651; 1 B. & C. 389.

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poverty, exercise a right of depasturing cattle. In that case, therefore, the trustees received money, not for their own use or benefit, but expressly for the benefit of others. This Court, however, fully approving of and acting upon the authority of the case of *Rex v. The Trustees for the Burgesses of Tewkesbury* (a), confirmed the order of sessions, confirming the rate made upon the corporation. The case of *Rex v. Watson* (b) was then, as it has now been, strongly pressed in argument; but it was there distinguished, and we think properly, because in that case of *Rex v. Watson* (b) the decision proceeded upon the ground that the temporary ownership seemed to have been given up to the three persons mentioned in that case, and that therefore they were properly rateable, as the exclusive occupiers of a certain portion of the land. The occupation of the appellants, though not the same precisely, is similar to that in the two cases cited. The pasture-masters are appointed at a court of the mayor and aldermen. The wardens are the mayor and three aldermen. The pasture-masters regulate the enjoyment of the stray, and direct the repairs of bridges, gates, and the like: they hire a herdsman, and have paid the poor-rate for the house in which he lived. It also appears that during the time that the stray, or part of it, was let to tenants, such tenants were assessed to the poor-rates, and the same were paid by the pasture-masters.

Upon the whole, we are of opinion that the mayor and commonalty of the city of York are properly rated for the relief of the poor in the township of Heworth, within which the lands lie, except, as before mentioned, the 5 acres mentioned in the case, which are not, like the rest, vested in the corporation, and from an assessment upon which they ought to be relieved, by an amendment of the rate in that respect.

The question of amount is entirely for the sessions.

Order of Sessions confirmed.

(a) 13 East, 155.

(b) 5 East, 480.

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IN THE EXCHEQUER CHAMBER.

Present—TINDAL C. J., Lord ABINGER C. B., PARKE J.,
GASELEE J., VAUGHAN J., BOSANQUET J., BOLLAND B.,
ALDERSON B., GURNEY B.

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CAMPBELL, Clerk, and others, v. MAUND.

1. The right to demand a poll is, by law, incidental to the election of a parish officer by show of hands, where there is no special custom to exclude it.

2. A poll, at an election, need not be demanded until after the decision of the chairman upon the show of hands.

3. Where a poll has been demanded to be held according to a particular mode, and has been held accordingly,

without any objection being made, any irregularity in the mode demanded is waived.

4. *Sturges Bourne's Act*, (58 Geo. 3, c. 69,) giving a plurality of votes to rate-payers, according to their rating, exempts (s. 8,) from its provisions, any vestry holden by virtue of any special act, or of any usage or custom. The local parochial act for Paddington (5 Geo. 4, c. cxxvi.) enacts, that the election of churchwardens shall be conducted from year to year in such manner as hath been usual in the same parish. It was proved in evidence that the mode of electing churchwardens had been by a show of hands, no poll ever having been demanded:—Held, that this was no evidence of a custom to exclude the granting of a poll, when properly demanded, and therefore that the mode of electing churchwardens in P. before the 58 Geo. 3, was by show of hands, with a power of going to a poll, in which case single votes carried the election, and that *Sturges Bourne's Act* having given each voter a plurality of votes, according to his estate, a show of hands, with the power of demanding a poll and plurality of voting, was the mode of election at the time of passing the local act (5 Geo. 4,) and continued by it (s. 10).

5. The provision in a local act, providing that the election of churchwardens shall be conducted in such manner as has been usual, applies to customary elections *de facto*, without reference to their conformity with the general law.

THIS was a bill of exceptions to the ruling of the Lord Chief Justice of the King's Bench, on the trial of this cause at Guildhall, at the sittings after Michaelmas term, 1835.

It appeared by the bill of exceptions, that the action was for a trespass and assault, for turning the defendant in error, then being one of the churchwardens of the parish of Paddington, out of the vestry room. The plaintiffs in error justified on the ground that the defendant was not a churchwarden or a vestryman; to which there was a replication of *de injuriâ*.

At the trial, according to the bill of exceptions, the assault was proved against the defendants below, who were *John Hill*, one of the churchwardens, the Rev. *A. M. Campbell*, the minister and perpetual curate, and the other was the beadle of the parish. The plaintiff gave in evidence an act of parliament, 5 Geo. 4, c. cxxvi. (local act, for the better governing and regulating the parish of Paddington,) by which an elected vestry is appointed in the mode pointed out by that act; and by sect. 10 it is enacted, that the election of

churchwardens shall take place on the Easter Tuesday, and be conducted from year to year in such manner as hath been usual in the same parish. That the mode of electing churchwardens in the said parish, both long before and after the passing the act of 58 Geo. 3, c. 69, intituled "An Act for the Regulation of Parish Vestries," and long before, and at and after the passing of the act of 5 Geo. 4, c. cxxvi. hereinbefore mentioned, had been and was by shew of hands, no poll ever having been demanded; that on the Easter Tuesday, 1835, the plaintiff, *James Maund*, and one *Thomas Hobbs*, were proposed as churchwardens, as were also *John Goodhind*, and the defendant *John Hill*; that the majority of the electors present at the said meeting, on a shew of hands, was in favour of the plaintiff and *Thomas Hobbs*, and so declared to be by the chairman, whereupon a rate-payer present demanded a poll, and required that a poll should be taken, pursuant to the statute of 58 Geo. 3, c. 69. This mode of taking the poll, giving a plurality of votes to persons, according to the amount of their rateable property in the parish, was objected to by an inhabitant present, who insisted that only a single vote should be allowed to each person, on the poll being so demanded. The following notice had been previously circulated in the parish; viz.

"Paddington, Middlesex, 16 April, 1835.

"If a poll should be demanded for the election of churchwardens, on Tuesday next, it will be opened at the National School Room, Harrow Road, immediately after the meeting of the inhabitants and occupiers, and will continue open, for the convenience of the rate-payers, until 6 o'clock on Thursday evening, and likewise from 8 to 6 on the following day; and in this case the ballot for vestrymen will commence on Thursday morning next, at 9 o'clock, will continue until 6 in the evening, and likewise from 8 to 6 on Friday, the following day. If no poll should be demanded for the election of churchwardens, the ballot for vestrymen will commence immediately after the meeting of the inhabitants and occupiers on Thursday, will continue until 6 o'clock that evening, and likewise from 8 to 6 on Wednesday, the following day.

A. M. Campbell, Minister.

Thos. Franch, } Churchwardens:
Jno. Goodhind, }

in pursuance of which, upon the demand being made, the

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chairman immediately granted a poll, and withdrew for the purpose of taking such poll, into the school room, which was at a small distance from the vestry room, and within the parish, and a more convenient place for taking the poll; that the poll was then and there taken, according to plurality of votes as aforesaid, and upon the result of that poll the defendant *John Hill* and the said *Goodhind* were declared duly elected, not only by a majority of votes as respecting property, but also by the plurality of single votes. The poll was kept open for two days, and all rate-payers within the parish, who had paid their taxes, were allowed to vote, whether they had been present or not when the said candidates were proposed, and the shew of hands was taken upon them. During the taking of such poll, several parishioners protested against the mode in which such poll was taken, and, acting upon such protest, did not vote. All four were afterwards sworn in by the surrogates. The plaintiff, on the 21st August, came to the vestry as a churchwarden, and was turned out of the room. Upon this evidence the defendants contended that the plaintiff had not been duly elected churchwarden, and that they were entitled to the verdict. But the chief justice told the jury, that upon the evidence aforesaid, (if believed) the said *James Maund* was duly elected churchwarden; that the tenth section of the local act, 5 *Geo.* 4, c. cxxvi. took the parish of Paddington out of the operation of the statute of 58 *Geo.* 3, c. 69, as to the election of churchwardens by a plurality of votes in a single person, by reason of rateable property in the parish; and that a poll being demanded, according to the provisions of that statute, under the circumstances above stated, the chairman was not justified in holding it at all, and therefore the election must be determined by the shew of hands being allowed to be in favour of the plaintiff; and with that direction left the same to the said jury, who found a verdict for the plaintiff. This direction was excepted to. There was an assignment of errors corresponding with this exception.

Sir *F. Pollock*, for the plaintiffs in error. Two propositions may be laid down in this case. First, that whatever construction may be put upon the local act, which was passed subsequent to 58 *Geo.* 3, c. 69, the election of the plaintiff below was invalid, there having been a demand of a poll, which was properly taken; and the demand of a poll, though made in a particular manner, is not void, even though the poll ought not to have been taken in that manner. Secondly, that the tenth section of the local act does not prevent the operation of the 58 *Geo.* 3, c. 69, and therefore the present plaintiffs, *Hobbs* and *Goodhind*, were duly elected churchwardens. On the first point it is clear that the demand of a poll puts an end to the election by the show of hands; *Anthony v. Seger* (a). That is the only mode of obtaining an accurate estimate of the sense of the parishioners upon any question. The show of hands is indeed a ready mode of taking the opinion of the meeting, but if any doubt arise upon that subject, a poll must be allowed, if demanded. In this case a poll was demanded. Then that demand cannot be vitiated by the claim to have it taken according to the mode prescribed by *Sturges Bourne's Act* (b). It was not necessary that the presiding officer should take it in that manner, if that were an illegal manner. He might take the poll as by law it ought to have been taken. [*Bosanquet J.* Is it any point in this case, that persons voted at the election who were not present at the vestry? or that the poll was demanded after the show of hands? In some corporations a poll must be demanded before the show of hands is declared.] It was impossible to confine the election to the persons present at the vestry. The parishioners are far too numerous to be able to be collected in one assembly. Secondly, the local act does not prevent the course of proceeding prescribed by the 58 *Geo.* 3, c. 69. That statute was passed in 1818. It contains, in sect. 8, an exception of all parishes where there existed any local custom or

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(a) 1 Hagg. Cons. Rep. 9.

(b) 58 *Geo.* 3, c. 69.

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usage. There was no custom or usage in this parish. Therefore in 1818 that statute applied to the parish of Paddington. It was not repealed by the 5 Geo. 4, c. cxxvi. That act only provides that the election of the churchwardens shall be conducted in such manner as hath been usual in the parish. It is merely intended that the mode of election then in use should continue. The 58 Geo. 3, c. 69, had been in operation, and in fact had governed the parish for the six years previous to the passing of this act. That time was sufficient to constitute a usage. The votes therefore were properly taken, according to the mode directed by that act.

Sir J. Campbell A. G. contrà. The question is, whether the plaintiff below was duly elected churchwarden, and that depends upon whether the election is to be determined by electors having a plurality of votes or having single votes. If the latter, *Maund* was duly elected. He had a majority of single votes at the vestry. But it is said that his election was invalid, because a poll was demanded. But the demand of a poll was a nullity. There was no dispute as to the sentiments of the majority of the persons present at the vestry. If there had been, there might indeed have been a demand of a poll of those persons, and then it would have been necessary to have appointed tellers to count the polls, and to have ordered all strangers, i. e. non-electors, to withdraw. But as the majority of the persons present was not disputed, there was no ground for demanding the poll. [Lord Abinger C. B. You say that the poll ought to be confined to the persons present at the meeting; that certainly is not consistent with the general understanding on these subjects. But supposing you are correct, the vicar had published an advertisement, that if a poll were demanded, it should take place in a particular manner, and that it should continue for two days.] He could not alter the law which did not warrant that course. It is presumed that all the rate-payers are present at the

vestry. It never can be held, that upon every act and resolution of the vestry a poll may be demanded, and that persons who have not been present at the discussion should come in, and by their votes control the deliberate decision of the parties who have been present. And there is no distinction between such acts of the vestry and the election of officers. In *Prideaux's Office of Churchwardens*, p. 48, (4th ed.) it is laid down, that "whatsoever rate shall be made by the consent of the major part of those who shall come to the said (vestry) meeting, will be a good and legal rate. For those who are absent in this case, devolving their right and votes upon those who are present, they who are present, how few soever they may be, are in construction of law the whole parish." [Sir *F. Pollock* referred to *Rex v. Archdeacon of Chester* (a).] It did not appear there but that a poll was the usual mode of taking the votes. [Lord *Abinger* C. B. The point was not raised there, but the majority of the persons present had carried their list.] The judgment of Lord *Stowell*, in *Anthony v. Seger* (b), only applies to a case where there is a doubt as to the judgment of the parties present. [Alderson B. The fact of acquiescence is not found by the jury.] It is stated as a fact, that *Maund* and *Hobbs* had a majority of the electors on the show of hands. [Alderson B. Suppose there had been a simple demand of a poll, I always supposed that that was a demand that the votes should be taken in a different way from the mode which had been adopted, viz. that the different polls should come and record their votes. It is not a question of the persons present or absent, but a different mode of taking the votes.] Then assuming that the poll might have been demanded at common law, yet a usage had obtained in this parish of determining the election by the show of hands and without a poll. [Lord *Abinger* C. B. I cannot conceive that such a custom would be valid.] Whether it be a legal custom or not, it existed in fact at the time when the 5 Geo. 4, c. cxxvi. was passed, and

(a) 5 N. & M. 413.

(b) 1 Hagg. Cons. Rep. 9.

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then it is preserved and rendered legal by the 10th section; *Rex v. The Churchwardens of St. James's, Westminster* (a). The doctrine of the Courts is, that in construing these expressions in acts of parliament, the *de facto* mode of election is to be looked to, and not that which may be legal. [Lord Abinger C. B. The mode of election in that case might be a usurpation, but it was not illegal.] The evidence shewed that there never had been a poll in the parish. Before and subsequent to the 58 Geo. 3, c. 69, there had been no other mode of voting than by show of hands, and thereupon the plurality of votes could not be claimed. That act does not therefore apply to the election of churchwardens. It is to be observed also, that the 5 Geo. 4, c. cxxvi. s. 3, refers to that statute, and directs expressly that it shall prevail in the election of vestrymen, but no such provision is made for the churchwardens. Upon the word *usual* mode, some explanation may be obtained from *Rex v. Birch* (b), and *Duke of Bedford v. Emmett* (c). [Alderson B. There is another objection to this election. It appears that Maund and Hobbs were put up together, and Goodkind and Hill together. That is not a good mode of election; *Rex v. Player* (d). Suppose a person to be desirous of voting for Hobbs and Goodkind, he could not do it, whereas by the poll he could.] That point was not made. The only question in the cause was, what was the usual mode of electing churchwardens in this parish. [Alderson B. That, was surely for the jury. It might be that there was no right to the poll, or that it was never required.]

Sir F. Pollock in reply. The judgment of the Court is desired on the main question, as to the application of the 58 Geo. 3, c. 69, to the parish of Paddington. If the poll can be refused, the plaintiff below would be right; but if not, whether the election be by single or plural votes, his election is void. The case of *Rex v. Archdeacon of Ches-*

(a) Decided Trinity T. 1836;

(c) 3 B. & Ald. 366.

not yet reported.

(d) 2 B. & Ald. 707.

(b) 4 T. R. 608.

ter (a) is in point, and shews that a poll is demandable. The argument, that the majority present must bind the absent, is not disputed, but the question is, what is the *mode* of ascertaining that majority. It is contended that it should be by a poll, when it is in doubt. The evidence in the case only shewed that no poll had been demanded. It was mere negative evidence, and could not establish that by the custom of the parish none could be claimed. The 10th section only meant to enact, that the vestry, who had been provided by the third section, should not have the right of electing the churchwardens, but that it should remain as before. The custom of the parish gave the election of *both* churchwardens to the parishioners, contrary to the general law, by which the minister elects one. That right the legislature would not interfere with.

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Cur. adv. vult.

TINDAL C. J., now delivered the judgment of the Court as follows:—The present case is brought before us by writ of error from the King's Bench, founded on a bill of exceptions, which was tendered by the plaintiffs in error (the defendants below), to the direction of the Lord Chief Justice of that Court, on the trial of the cause. The action was an action of assault, to which the defendants pleaded a justification, stating in substance that a general meeting of a vestry of the parish of Paddington was duly assembled in a convenient place, and that the plaintiff, without right or authority so to do, and not being one of the churchwardens, nor a vestryman of the parish, unlawfully intruded himself into the vestry room, and refused, upon request made, to go out of the same, whereupon he was gently removed by the direction of the defendants. The replication takes issue on the facts of this justification, and the inquiry at the trial was reduced to this single question, whether *Maund*, the plaintiff below, had been duly elected churchwarden or not. The learned Lord Chief Justice

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told the jury, "that upon the evidence (if believed) the plaintiff *Maund* was duly elected churchwarden; that the 10th section of the local act, 5 *Geo.* 4, c. cxxvi. took the parish of Paddington out of the operation of the statute 58 *Geo.* 3, c. 69, as to the election of churchwardens by a plurality of votes in a single person, by reason of rateable property in the parish; and that a poll being demanded, according to the provisions of that statute, under the circumstances proved, the chairman was not justified in holding it at all, and therefore the election must be determined by the show of hands, the majority of single votes upon the show of hands being allowed to be in favour of the plaintiff." To this direction, the defendant below excepted in point of law.

The bill of exceptions raises two points, each of which has been argued before us; viz. first, whether the election which took place, at a poll demanded and granted, under the circumstances stated in the bill of exceptions, was a legal and valid election; and secondly, whether the provisions of the statute 58 *Geo.* 3, c. 69, apply to and govern the parish of Paddington.

And upon the first question we are all of opinion that the election which took place at the poll, demanded and granted in the manner and under the circumstances stated, was a legal and valid election.

We agree to the proposition contended for on the part of the defendant in error, that whatever was the particular mode of electing the churchwardens for the parish of Paddington, at the time of passing the local act, the same mode is still preserved, and remains unaltered in the parish, by virtue of the 10th section of that act. For the provision in that section "that elections of churchwardens shall take place on Easter Tuesday, and be conducted from year to year in such manner as hath been usual in the same parish," appears to us to intend the usual and customary mode of election *de facto* observed there, whatever it might be, and without any reference to its origin or conformity with the ge-

neral law. But we are at the same time of opinion, that the mode of electing churchwardens in the parish of Paddington, set out in the bill of exceptions, is not inconsistent with, nor does it by any means exclude the right of the parishioners of Paddington to have recourse to, a poll in the election of churchwardens for that parish.

All that is stated to have been proved to the jury is, "that the mode of electing of churchwardens in the parish of Paddington had been by a show of hands, *no poll ever having been demanded.*" There is no evidence before them of any poll having been ever demanded and refused, or of any custom or usage, in negative words, to exclude the granting of a poll, when properly demanded.

The question, therefore, becomes this, whether the right to demand a poll is by law incidental to the election of a parish officer by show of hands, where there is no special custom to exclude it? And we think such right is, in point of law, a necessary incident or consequence to the mode of election by show of hands, wherever it is not by special custom excluded. Independently of any authority upon the subject, the recourse to a poll, when the population of the parish is large, appears to be the only mode of ascertaining with precision the numbers of those who vote on each side, and the right of each elector to vote. Again, it is, under the same circumstances, the only mode by which each individual elector can have the power of expressing his opinion at all, for in the case of populous parishes, no vestry room can be large enough to contain the whole body. Still farther, where the election is carried on with any warmth of popular feeling, it is the only mode by which a large portion of the community can express their opinion with freedom and security. But, in addition to these general grounds, we think the authority of Lord *Stowell's* judgment, in the case referred to in the course of the argument (a), is entitled to the greatest consideration in a matter of this nature; that "where a poll is demanded, the election

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(a) *Anthony v. Seger*, 1 Hagg. Cons. Rep. 9—13.

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commences with it, as being the regular mode of popular elections, the show of hands being only a rude and imperfect declaration of the sentiments of the electors." "It often happens," adds that learned judge, "that on a show of hands the person has the majority, who, on a poll, is left in a minority; and if the parties could afterwards recur to show of hands, there would be no certainty or regularity in elections. I am of opinion, therefore," he adds, "that when a poll is demanded, it is an abandonment of what was done before, and that every thing anterior is not of the substance of the election, nor to be so received."

The right to demand a poll being, therefore, as it appears to us, by the common law an incident to the popular election of a person to an office, we think the electors cannot be deprived of it without a special custom of election inconsistent with such right, or expressly excluding it by negative terms, viz. that no such right exists in the particular parish. And we are clear that there is no such finding as to the parish of Paddington, or facts stated which could warrant such a finding: But that the case strongly resembles that of *Doe v. Llewellyn (a)*, where it was held by the Court of Exchequer, that the finding in a special verdict "that there did not appear on the Court Rolls any entry of a surrender to the use of a will," was no finding of a custom that lands within the manor could not be surrendered to the use of a will.

But it is objected, that the demand of the poll was in the present case a nullity, on two grounds; first, because it was not made until after the show of hands was declared by the chairman to be in favour of the plaintiff, and of the candidate joined with him: and, secondly, because the demand required that the poll should be taken pursuant to the statute 58 Geo. 3, c. 69.

We think it an answer to the first objection, that, in the nature of the thing, the demand of a poll never is, nor can reasonably be expected to be made, until the necessity for

(a) 2 C. M. & R. 503.

such demand arises, that is, until one of the contending parties is dissatisfied with the decision of the chairman upon the show of hands, from which it is in the nature of an appeal.

And as to the second objection, it might be sufficient to observe, there is no evidence in this bill of exceptions, that any one of the parishioners in vestry objected to the demand of the poll on that ground. If the granting of the poll had been objected to on that ground and refused, the question might, by possibility, have arisen, whether the annexing to the demand of a poll the requisition of a particular mode of conducting it, did or did not afford a justifiable excuse for the refusal to allow the poll. But in this case neither of the parties objected that a poll should in fact be taken. And as in point of fact, upon the present occasion, a poll was granted and actually taken between the contending parties, we hold there has been a complete waiver of any irregularity, in point of form, in the mode of demanding the poll, even if any such irregularity had existed, which, however, we think was not the case.

But it is lastly, and indeed principally objected, that the poll was improperly taken, the electors having been allowed to have a plurality of votes, according to the amount of their property, as provided by the statute 58 *Geo. 3*, c. 69, and not having been each restrained to the exercise of a single vote; whereas the parish of Paddington, as it is contended on the part of the plaintiff below, is excepted out of the operation of that act by the 10th section of the local act, 5 *Geo. 4*, so that no elector can have more than a single vote in the election of a churchwarden. But, as the evidence before the jury was, that the defendant *Hill*, and the candidate joined with him, who were declared duly elected at the poll, were not only elected by a majority of votes, with reference to property, but also by the plurality of single votes, it becomes a matter of indifference to the parties to this suit, whether the legal right of voting in the parish of Paddington is governed by the statute 58 *Geo. 3*, or not,

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for upon neither supposition has the plaintiff below been elected to the office of churchwarden.

As, however, both the parties have been heard on this question before us, and have expressed a desire that we should deliver our opinion upon it, and as we ourselves think the expression of our unanimous opinion may have the effect of preventing any future litigation on the subject, we have thought it right to enter upon the discussion of the second question, that is, whether the mode of election by the statute of 58 *Geo. 3.* does or does not extend to the parish of Paddington ?

This question depends for its answer on the proper construction to be put upon the 8th section of the general act, and the 10th section of the local act.

The 8th section of the general act provides, "that nothing in that act contained shall extend to take away, lessen, prejudice, or affect the powers of any vestry or meeting holden in any parish, township, or place, by virtue of any special act or acts, *or of any ancient or special usage or custom.*"

Now there is no special usage or custom, as to the mode of electing churchwardens in the parish of Paddington, found upon the bill of exceptions, where they are to be elected in vestry. The churchwardens, at the time of passing that act, were chosen by a show of hands, so were the elective churchwardens, generally speaking, throughout most of the parishes in England. It is the general mode of election of churchwardens throughout the realm. But it is found that no poll had ever been demanded in the parish. The same may be said of very many, perhaps by far the greatest part of the parishes in England, in which the parishioners have never demanded a poll, because they have been satisfied by the show of hands. If the custom within the parish of Paddington had, by negative words, *excluded* a poll, it would then indeed have been a special usage or custom which would have taken that parish out of the operation of the statute, for it is obvious that an elec-

tion by show of hands alone, is necessarily inconsistent with the allowance of a plurality of votes in any one person. But if the usage or custom within Paddington, as set out in the bill of exceptions, should be held sufficient to exclude a parish from the operation of the 58 Geo. 3, on the ground of its being "special," the statute would have comprehended a very small proportion indeed of the numerous parishes in England.

If then the 58 Geo. 3, taken by itself, includes within its operation the parish of Paddington, is there any clause in the local act which can exempt the parish from its operation? The only clause which can be contended to have that construction is the 10th. By that clause, as before observed, it is enacted, "that the election of churchwardens shall take place on Easter Tuesday, and be conducted from year to year in such manner as hath been usual in the same parish."

This clause, as we have before observed, was intended to leave the parish of Paddington precisely in the same condition as it was at the time of the passing that act. Now what was the condition of the parish as to its mode of electing churchwardens at that time? We answer, by show of hands, if no poll is demanded; and if demanded, then by a poll, taken according to law. Now, by law, at that time, a poll must be taken by a plurality of votes, as provided by the 58 Geo. 3, where the parish falls within the operation of that statute. And the mere fact, that the votes have never been actually taken in that mode since the passing of the statute, is no more a proof that the statute does not apply, than the fact of the non-demand of a poll proves that such poll was not demandable of right.

Upon the whole of this second question, we think that the mode of electing churchwardens in the parish of Paddington, before the passing the 58 Geo. 3, was by a show of hands, with a power of going to a poll, in which case the majority of single votes decided the election; that the statute 58 Geo. 3, gave each voter a plurality of votes at

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the poll, when demanded and held, according to the quantity of his estate ; and that such being the rightful mode of election at the time of passing the local act, it was continued and preserved to the parish by the 10th section.

We think, therefore, that upon the present record a judgment of *venire de novo* must be awarded.

Venire de novo awarded.

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Tuesday,
January 31st.

REX v. GADSBY and others, Overseers and Churchwardens
of EDLASTON.

1. A writ of mandamus to the overseers and churchwardens of a parish to make a poor's rate, may be issued out on the prosecution of one of the overseers, where it appeared by affidavit that the other overseer had refused to concur in making the rate, and the 1 Will. 4, c. 21, s. 56, makes no difference as to the parties who may obtain the writ.

2. Where the writ was obtained on an affidavit stating that a rate was necessary for the relief

THE writ issued in this case (a) recited, that " whereas we have been informed that there is no legal rate or assessment made by you the said overseers and churchwardens of the said parish, upon the inhabitants and occupiers of lands, houses, and other things rateable within the said parish, for and towards the necessary relief, support, and maintenance of the poor of the said parish, according to the form of the statute in such case made and provided : but that you the said overseers and churchwardens, not regarding your duties in this respect, have absolutely neglected and refused, and still do neglect and refuse to make any such rate &c. &c." The only affidavit used in applying for the writ was made by *Gadsby*, one of the overseers (b). In Michaelmas term last, *Whitehurst* had obtained a rule, upon reading the writ and the said affidavit, calling upon the prosecutor thereof to shew cause why the writ should not be superseded, as it had been obtained by one of the overseers to whom it was directed, or quashed, as insufficient upon the face of it.

Greaves now shewed cause. The writ may issue on

(a) 1 Nev. & Perr. 20.

(b) *Vide ante*, p. 20.

of the poor, and the mandamus recited that no rate had been made for the necessary relief of the poor, and that the overseers had refused to make a rate :—Held, that the writ contained upon the face of it sufficient to give the Court jurisdiction.

the application of one overseer or churchwarden, and in that case must be directed to all; *Anonymous* (a). This writ is in the usual form, and was drawn up at the Crown Office. A similar one issued in *Rex v. St. Mary's, Leicester* (b). [He was then stopped by the Court.]

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Whitehurst contra. I. The anonymous case cited was decided fourteen years before the late act (c) regulating the costs of proceedings by mandamus, and which must prevent, for the future, any one suing out the writ against himself. The 9 Ann. c. 20, s. 2, contains the provisions which relate to writs of mandamus, and the power given them to plead and traverse, shews that there must be two persons to each writ—the prosecutor and the party making the return to it. As the new act (c) allows the Court to give costs, if a churchwarden or overseer is allowed to sue out a writ against himself, this absurdity would follow, he would get costs whether he succeeds or fails; if the return be bad, he would get them as prosecutor; if it were good, he would get them from the parish (d).

II. The writ does not shew that there was any necessity for a poor's rate. It has been repeatedly laid down, that the writ must contain upon the face of it every thing necessary to give the Court jurisdiction, and every material fact in order to give the other side the opportunity of traversing. *Rex v. Bishop of Oxford* (e), *Rex v. Justices of the West Riding* (f), *Rex v. The Margate Pier Company* (g).

Lord DENMAN C. J.—As the word *necessary* is in the writ, that appears to us to be sufficient; for the terms of the writ being reconcileable with the assertion in the affidavit of *Gadsby* (h), that a rate was required for the relief

(a) 2 Chit. 254.

(b) Not reported.

(c) 1 W. 4, c. 21, s. 6.

(d) See *Rex v. Great Yarmouth*,
 9 D. & R. 682.


(e) 7 East, 345.

(f) 7 T. R. 467.

(g) 3 B. & Ald. 230.

(h) *Vide ante*, p. 30.

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of the poor of the parish, it calls for the interference of this Court. As to the other point that has been raised, the late act has made no alteration as to the parties who may obtain the writ, but only with regard to the costs on such applications.

WILLIAMS and COLERIDGE Js. concurred.

Rule discharged

END OF HILARY TERM.

EASTER TERM,

IN THE SEVENTH YEAR OF THE REIGN OF WILLIAM IV.

MEMORANDA.

ON the 24th of February, *Thomas Coltman*, Esq., one of His Majesty's Counsel, was called to the degree of the coif, and gave rings with the following motto:—" *Jus suum cuique.*" On the same day he was appointed one of the Judges of the Court of Common Pleas, (in the room of Mr. Justice *Gaselee*, who had resigned,) and shortly afterwards His Majesty conferred upon him the honour of knighthood.

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On the same day the following gentlemen were appointed His Majesty's Counsel learned in the law:—

Francis Newman Rogers, of the Inner Temple, Esq.; *Biggs Andrews*, of the Middle Temple, Esq.; *George Chilton* and *John Evans*, of the Inner Temple, Esqs., and *Richard Budden Crowder*, of Lincoln's Inn, Esq.

On the 9th of March, *Francis Whitmarsh*, of Gray's Inn, Esq., and *Charles Purton Cooper*, of Lincoln's Inn, Esq., were also appointed His Majesty's Counsel learned in the law.

On the 2nd of March *John Jervis* of the Middle Temple, Esq., received a patent of precedence, which authorized him to take rank before *Francis Whitmarsh*, of Gray's Inn, Esq., and *Charles Purton Cooper*, of Lincoln's Inn, Esq.

Rule of the Courts of King's Bench, Common Pleas, and Exchequer, appointing Examiners.

It is ordered, that the several Masters and Prothonotaries for the time being of the Courts of King's Bench, Common

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Memoranda.

Pleas, and Exchequer respectively, together with *William Tooke, Thomas Adlington, Samuel Amory, Benjamin Austen, Michael Clayton, Edward Foss, Richard Harrison, Philip Martineau, Thomas Metcalfe, Charles Ranken, Charles Shadwell, and John Teesdale*, Gentlemen, Attornies, be, and the same are hereby appointed examiners for one year now next ensuing, to examine all such persons as shall desire to be admitted attornies of all or either of the said Courts, and that any five of the said Examiners, one of them being one of the said Masters or Prothonotaries, shall be competent to conduct the said examination in pursuance of, and subject to the provisions of the Rule of all the said Courts made in this behalf in Hilary Term 1836.

(Signed by the fifteen Judges.)

The Judges in Banc this Term were,
 Lord DENMAN C. J. PATTESON J.
 LITTLEDALE J. COLERIDGE J.

In the Bail Court,
 WILLIAMS J.

Monday,
 April 17th.

The KING v. HARRIS.

The Court refused a rule nisi for a quo warranto information against the town clerk of a borough, which was moved for in order to contest his right to compensation as a displaced

STARKIE moved for a rule, calling upon the defendant to shew cause why a quo warranto information should not be filed against him, for having exercised the office of town clerk of Cambridge, from January 1833 to January 1836, on two grounds; first, that he was not a burgess; second, that he had not taken the oaths of office as town clerk; viz. either the oaths of allegiance and supremacy; nor sub-officer under the 5 & 6 Will. 4, c. 76, s. 66.

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scribed the declaration not to weaken the Church of England, under the stat. 9 Geo. 4, c. 17, s. 4; and he stated that the object of the application was to ascertain whether Mr. *Harris* (who had been removed from his office by the town council) was entitled to compensation as a displaced municipal officer under 5 & 6 Will. 4, c. 76, s. 66. [Lord *Denman* C. J. Does not that section mean to give compensation to all officers *de facto*, who shall be displaced (a)?] The section speaks of the officer *entitled* to compensation. Now a town clerk, who has omitted to take the oaths of office, is not such an officer, and his election is declared to be expressly void by 13 Car. 2, st. 2, c. 1, s. 12, and by 9 Geo. 4, c. 17, s. 4. It appears from many authorities, that the title to an office is merely inchoate, until the party elected has taken the oaths. If a quo warranto information issue against him, there can be no doubt that judgment of ouster must be given, *Rex v. Pindar* (b); and although it appears to have been thrown out in *Rex v. Clarke* (c), that for the omission to swear in an officer, there need not be a judgment of ouster absolute, but judgment of ouster *quousque* only, until the title could be consummated by a proper swearing in, yet in *Rex v. Courtenay* (d), Lord *Ellenborough* expressly stated that no judgment of ouster *quousque* could be found on the files of this Court. Nor does the Annual Indemnity Act (e) aid the defendant, for that act was only intended to offer a premium to officers who had omitted to take the oaths, and who were still in office; for it enacts, that upon performing the conditions expressed in the act, such persons shall be recapacitated and restored to the same state and condition as they were in before their omission, and therefore it cannot apply to a

(a) See *Rex v. Mayor of Bridgewater*, ante, p. 466.

(b) Cited in *Rex v. Reeks*, 2 Ld. Raym. 1445; S. C. 1 Str. 582, nom. *Case of the Mayor of Penryn*, confirmed Dom. Proc. 2 Bro. P. C. 294, nom. *Rex v. Pender*; see

also *Rex v. Hearle*, 1 Stra. 625.

(c) 8 East, 75.

(d) 9 East, 246-67.

(e) See the 9 Geo. 4, c. 6, 1 Ch. St. 574, which is the latest printed in the Collections of Statutes.

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party who is out of office. Besides, the act excepts cases where, as in the present, the office has been filled up.

The COURT (a).—There is clearly no ground for this rule. If there is any thing in the objection, Mr. *Harris* is not entitled to compensation under the Municipal Corporation Act, and the town council should refuse it. If there is an appeal to the Lords of the Treasury, the objection may be made there, and probably the question may be raised in this Court, if application should be made to enforce their lordships' order by mandamus. In *The King v. Lord Radnor* (b) it was held, that a quo warranto information may issue after the person is out of office, for the rights of other persons may depend upon the validity of his election, but there is no civil right of any kind in question here.

Rule refused.

(a) Lord Denman C. J., *Little-
dale, Patteson, and Coleridge* Js.

(b) 2 Lord Ken. 498.

Monday,
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DUNN and HOWES, Assignees of SHAW, v. MASSEY and another.

Sect. 70 of the Bankrupt Act (6 *Geo.* 4, c. 16,) does not enable the assignees of a bankrupt to acquire a legal estate in premises mortgaged by the bankrupt, after the day of payment mentioned in the condition is passed, by making tender to the mortgagee of the mortgage money and interest.

TROVER for title deeds belonging to *Shaw* the bankrupt. Pleas: first, not guilty. Second, that *Shaw* was not possessed before he became a bankrupt. Third, that plaintiffs, as assignees, were not possessed *modo et formâ*. At the trial of this cause in London, at the sittings after last Hilary term, before Lord Denman C. J., it appeared that *Shaw*, the bankrupt, carried on business as a corn merchant at Lynn, where he had extensive granaries and warehouses; that in 1830, being in embarrassed circumstances, he had mortgaged these premises to a Mr. *Allen* for 2000*l.*, and that in April 1832 he executed a second mortgage upon the

premises to the plaintiff *Dunn* for a further sum of 2000*l*. In December 1832 the premises were burnt down. The defendants, who were bankers at Lynn, and under large advances to *Shaw*, having pressed him for security in December 1833, on the 16th of that month he executed a mortgage to them of the premises above-mentioned. *Shaw* shortly afterwards absconded, and a fiat of bankruptcy was obtained against him. After the fiat the defendants obtained from *Allen*, the first mortgagee, an assignment of his mortgage. The plaintiffs contended, that the mortgage of 16th December, 1833, to the defendants was a fraudulent preference, and therefore that the defendants were only entitled to retain the deeds as a lien for the mortgage money and interest which they had paid *Allen*; and that as the plaintiffs had tendered that sum, they were entitled, under sect. 70 of the Bankrupt Act (*a*), to have the custody of the deeds. The jury found that the deed of the 16th December, 1833, was a fraudulent preference, but Lord *Denman* C. J. being of opinion, that the legal estate was in the defendants as assignees of the first mortgagee, and that the 70th section did not enable the assignees of the bankrupt to obtain the estate by tender of the mortgage money, he directed a verdict to be entered for the plaintiffs on the first issue, and for the defendants on the second and third, giving the plaintiffs leave to move to enter a verdict on all the issues.

Sir *F. Pollock* now moved accordingly, and contended that the true construction of sect. 70, was to put the assignees into a better condition than the bankrupt, and to enable

(*a*) 6 *Geo.* 4, c. 16, s. 70, enacts, "that if any bankrupt shall have granted, conveyed, assured, or pledged any real or personal estate, or deposited any deeds, such grant, &c. being upon condition or power of redemption at a future day, by payment of money or otherwise, the assignees may, before the time of the performance of such condi-

tion, make tender or payment of money or other performance, according to such condition, as fully as the bankrupt might have done, and after such tender, payment, or performance, may sell and dispose of such real or personal estate for the benefit of the creditors as aforesaid."

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them, on tendering the money advanced to the bankrupt on any mortgage, to obtain possession of the estate, and to sell and dispose of it for the benefit of creditors, without the necessity of applying to a Court of Equity.

LITLEDALE J.—It appears to me that the legal estate remained in the first mortgagee. By the ordinary provisions of mortgage deeds the condition is, that if the money shall be paid on a certain day, then the deed is to be void, but if the money is paid after that day, then the mortgagee must go into a Court of Equity for relief. The object of the Bankrupt Act, sect. 70, seems to have been to put the assignees into the place of the bankrupt, and also to enable them not only to pay the money *at* the day, but also *before* the day, which would not be a sufficient performance of the condition on the part of the bankrupt himself. Here it does not appear but that the day of payment had passed, and therefore the title is in the assignee of the first mortgage: at all events, on these issues the title is not proved to be in the assignees of the bankrupt.

PATTESON J.—Independently of the 70th section, this action could not be maintained, as the assignees of a bankrupt could not tender the mortgage money except under the statute. Now the act does not say that upon a tender the estate shall vest in the assignees, whatever might be the case if the day of payment had not arrived; for the words of its clause certainly seem to give the assignees some power of anticipating the performance of the condition. But it does not give them any power after the day of payment is passed, I therefore do not see that the plaintiffs have made out any title.

COLERIDGE J. concurred.

Lord DENMAN C. J.—There was no difficulty as to the finding of the jury, for after some little evidence had been given on the part of the plaintiffs, they found that the deed of 1833 was a fraudulent preference.

Rule refused.

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Wednesday
April 19th.

COX v. PAINTER.

TRESPASS: Plea, Not Guilty. At the trial before *Parke B.*, at the last assizes for Berkshire, it appeared that the action was brought by tenant against landlord, for turning plaintiff out of possession; the defence set up was, that the defendant having entered to distrain, had stopped upon the premises by permission, but as there was no plea of leave and licence, the learned baron said there must be a verdict for the plaintiff; but on examining the nisi prius record, there did not appear to be any date stated to the writ of summons, and his lordship told the jury, that although the verdict must pass for the plaintiff, there was no mode of estimating the damages; for as the original entry by the plaintiff was lawful, the action might have been commenced within a day or two of the distress being put in.

The Court or a judge have power, at any stage of the proceedings, to amend an issue, &c. not made up in compliance with the forms given in the R. Hil. T. 4 Will. 4, therefore, where the nisi prius record did not contain the date of the writ of summons, held, that the judge might supply the omission.

The learned baron was applied to, to amend; but *J. J. Williams*, for the defendant, cited *John v. Currie (a)*, to shew that his lordship could not look out of the record, and that he had no power under the 3 & 4 Will. 4, c. 32, s. 23, to amend, as this was not a variance, but an omission on the record. His lordship doubted his power to amend, but stated, as he had made such an amendment once before, and it had not been appealed against, he would amend, and he called for the production of the writ itself on which the date appeared. He then left the amount of damages to the jury, who found for the plaintiff, with 40s. damages. The learned baron then gave leave to the defendant to move to enter a nonsuit, or for a new trial.

J. J. Williams now moved accordingly, and contended, that an amendment could not be made, and that a recent case in the Exchequer decided, that the issue should be made up in the form pointed out by the new rules. [*Littledale J.* If the learned baron's difficulty arose as to the time of commencing the action, why was not that obviated by producing

(a) 6 C. & P. 618.

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the writ itself, in which case there was no need for amendment?] That amounted to a surprise on the defendant, and the learned baron was of opinion that he could not look out of the record. The form of the *nisi prius* record is expressly given in the rules of Hil. 4 Will. 4. [*Littledale J.* The heading of the forms given in those rules, directs that issues, judgments, and other proceedings, shall be in the several forms hereunto annexed, provided, that in case of non-compliance, the Court or a judge may give leave to amend. The same rule, therefore, which directs the form, expressly permits amendment. In *John v. Currie (a)*, the omission was of an averment in the plea; it was not an informality in the issue. *Coleridge J. Ball v. Hamlet (b)* seems to be the case in the Exchequer referred to. The issue there was not framed according to the form; and a rule was granted to set aside the proceedings; but *Parke B.* would not allow it to be a stay of proceedings, and at the same time gave leave to amend.]

The COURT (c).—If the learned baron had been wrong in amending, still, on the production of the writ, all became right. But the power of amending is clearly given by the rule itself, and the power is not confined to any particular stage of the proceedings.

Rule refused.

(a) 6 C. & P. 618.

(b) 1 C. M. & R. 575.

(c) Lord Denman C. J., *Littledale, Patteson, and Coleridge, Js.*

The KING v. The Inhabitants of the Township of
 SCARISBRICK.

Thursday,
 April 20th.

Where township A. was liable by custom to repair

the highways within it, and was indicted for non-repair; the defence set up was, that township B. was liable; and an agreement was produced, made between the owners of the soil of the two townships, in 1591, by which the owner of township B. agreed to repair the roads in township A., and it was agreed that a lawyer should be elected to carry the agreement into effect; it was proved also that township B. had repaired the road up to within a short time of the trial: Held, that on such evidence it was not incumbent on the judge to leave it to the jury to presume that legal instruments had been executed, casting the liability on township B.

situate within the township of Scarisbrick, in the parish of Ormskirk. The indictment charged a customary liability on the inhabitants of the townships within the parish of Ormskirk, to repair the highways situate within them, which would be otherwise repairable by the parish at large. Plea, Not Guilty. The indictment, which was preferred at the Kirkdale Midsummer quarter sessions, 1836, was removed by certiorari into this Court, and was tried at the last spring assizes at Liverpool, before *Patteson J.* The customary liability of the township was proved as alleged. The defence set up by the inhabitants of Scarisbrick was, that the inhabitants of North Meols, another township in Ormskirk, were liable to repair the road in question. To prove this, a counterpart agreement, produced from the muniment room of the *Bold* family, signed by '*Edward Scarysbrycke*,' was put in. This agreement, dated in 1591, was entered into between *Edward Scarisbrick*, esq. of the one part, and *Barnaby Kitchen* and *John Bold*, esquires, and *Hugh Hesketh*, gent. of the other part. Mr. *Scarisbrick* at that time was lord of the manor, and seised in fee of the whole township of Scarisbrick, and so, with slight exceptions, is his lineal descendant at the present day. *Kitchen*, *Bold*, and *Hesketh* were also seised in fee of the whole township of North Meols, and the descendants of the two latter are also still owners in fee of the township.

The agreement, after providing for the division of a certain moss, respecting which there appeared to have been controversies, and for the proportions in which the boundary ditch should be repaired, proceeded as follows :

" It is further agreed, that in consideration of which partition to be made and done in manner and form aforesaid, the said *Edward Scarisbrick* is contented to grant, permit, and suffer, and to allow unto the said parties and every of them, and their heirs, and to the rest of the inhabitants of North Meols, a convenient highway and free passage of eight yards broad, unto the town of Ormskirk, through his part and portion of the said moss, containing &c., whereof the said *Edward Scarisbrick* is contented to make, or cause

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to be made, the one-half thereof passable for horse and man; and that the said *Barnaby Kitchen, John Bold, and Hugh Hesketh*, make, or cause to be made, the other half thereof towards the Meols passable for horse and man, as is aforesaid." The agreement also contained a clause, that "for the better establishing and performing of all and singular the premises before declared and set down, that there shall be a good and sufficient lawyer, indifferently elected and chosen at and afore Michaelmas next, upon all their costs and charges, to make and set down such further assurance for the performance of these articles, as by him shall be thought most meet and necessary."

It was also proved, that in 1631, *Bold and Hesketh*, who were then seised in fee of the whole township of North Meols, filed a bill in the Chancery of the Duchy of Lancaster, against *Edward Scarisbrick*, the grandson of the party to the agreement, for specific performance.

It also appeared, that up to the year 1835, the inhabitants of North Meols had repaired the road in question, which was the latter half of the road mentioned in the agreement.

It was contended, on these grounds, that the inhabitants of Scarisbrick had shewn a liability in other parties to repair the roads; his lordship, however, thought, on the authority of *Rex v. St. Giles, Cambridge (a)*, and *Rex v. The Mayor of Liverpool (b)*, that the case set up was no defence, and he directed a verdict of guilty.

Cresswell now moved for a rule nisi to set aside the verdict, and for a new trial, on the ground of a misdirection. There were sufficient grounds in this case for the jury to infer that the proper legal machinery had been applied to carry out the agreement between the owners of the soil of these two townships. If legal conveyances were executed, it is clear that the inhabitants of North Meols are liable, and not the inhabitants of Scarisbrick; for although it was contended at the trial, on the authority of *Rex v. St. Giles, Cambridge (a)*, that the plea ought to have shewn who were

(a) 5 M. & S. 260.

(b) 3 East, 86.

liable to repair, there is a distinction between the case of a parish indicted for a non-repair, who are liable of common right, and a township against whom a *prima facie* case must be made out: 2 *Wms. Saund.* 159 a, note (10) to *Rex v. Stoughton*.

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It is commonly said, that a liability to repair *ratione tenuræ* can only exist by prescription; but there is no authority for the position. The doctrine arises from the necessity of supposing a good consideration for the burden; and where a party is found who has repaired from time immemorial, prescription is referred to as a good foundation for the obligation. But prescription is only usage in pursuance of a supposed grant; and the obligation may arise by an actual grant within the time of legal memory. *Callis*, p. 117 (old ed.), lays down 'a man by the tenure of his land may be bound to repair a wall, bank, or other defence mentioned in the law;' and in proof thereof, the book-case of 11 *H. 7*, fol. 12, is full in point: where it is said, that if, before the stat. Westm. 3, a man had made a feoffment in fee; or if, since that statute, one had made a gift in tail, to hold the same by repairing a bridge, the said feoffee and donee, and his heirs, should have been bound by the said tenure to repair the said bridge:" for which he also cites *Porter's case* (a).

Therefore as lands may be so settled at this day, North Meols may have been so settled. In a recent case it was held, that the grant of the pier and certain profits to the mayor and burgesses of Lyme, was a sufficient consideration for the liability attaching upon them to repair the sea-walls and mounds (b). So in this case, the dedication by the lord of Scarisbrick, of a road for the inhabitants of North Meols, was a sufficient consideration for the latter to take upon them the burden of repairs. The only question is, whether there is sufficient evidence to fix them with the agreement in 1591. [*Patteson J.* I was struck at the trial with *Rex v. The Mayor, &c. of Liverpool* (c); the seventh count

(a) 1 Rep. 25 b.

Henley, 3 B. & Ad. 77.

(b) *Mayor of Lyme Regis v.*

(c) 3 East, 86.

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of the indictment there charged the defendants with a liability to repair, by virtue of a certain agreement; and upon a demurrer to the count, *Scarlett*, for the crown, admitted that he could not sustain the count.] There was nothing which the Court could presume in that case. Here all that is required, is, a presumption that parties have done what they agreed to do, and what their conduct in repairing for nearly two hundred and fifty years, shews was very probably done. Judges have said that they would presume an act of parliament to support a long possession. All that is required here, is for the jury to presume a conveyance.

LORD DENMAN C. J. (a)—Whether a liability to repair *ratione tenuræ* must necessarily be immemorial or not, we are not now called upon to decide. Upon the other point I think there was no evidence to leave to the jury that any of that machinery which has been spoken of existed. It is impossible that it could have existed without some vestige of it having been traced.

COLERIDGE J.—I do not think that a judge should leave a state of facts to be presumed by a jury, unless he could advise them to make such a presumption. It is clear that the jury could not have found that such conveyances were made, if the case had been left to them upon that issue. When a case comes into Court, in which it appears that for many years past all acts done would be illegal without a presumption being made, then a jury can be fairly and properly advised to make it. But here it is much more natural to suppose that all that has been done was in virtue of the personal agreement, than to suppose that cumbrous machinery existed, even admitting that such could exist to create the liability in question.

PATTESON J.—It is quite palpable that no such conveyances ever did exist.

Rule refused.

(a) *Littledale J.* was absent.

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Thursday,
April 21st.

THOMAS v. JENKINS.

REPLEVIN. At the trial at the last Swansea Lent assizes, before *Coleridge J.*, the question raised related to the boundary between two farms. A witness was asked, on behalf of the defendant, whether the boundary of the plaintiff's farm was the same as the boundary of a certain hamlet. No objection was made to this question, which the witness answered in the affirmative. He was then asked, whether he had heard from old people, deceased, what was the boundary of the hamlet. To this question the plaintiff's counsel objected, but the learned judge allowed it to be put. Verdict for the defendant.

Where on an issue as to the boundary of a tenement, evidence has been given that the boundary in question is the same with the boundary of a certain hamlet, evidence of reputation as to the boundary of that hamlet is then receivable as proof of a fact relevant to the issue.

Chilton now moved for a rule to shew cause why the verdict should not be set aside and a new trial had, on the ground of the admission of improper evidence. It is clear that the defendant could not have adduced evidence of reputation to prove the boundary of his farm. Then the question is, shall he be allowed to do indirectly, what he cannot do *directly*. A preliminary issue would thus be introduced, viz. whether the boundary of the farm and the hamlet were identical? of this issue the opposite party can have no notice; he cannot be prepared to meet it. But if it be assumed, against probability, that he will be in a condition to offer evidence in contradiction, the inconvenience and impolicy of allowing this sort of insertion of a collateral issue in a cause, is obvious. Again: the evidence to prove the identity will always be rather matter of opinion than of fact. Besides, the boundary of a farm is variable; that of a hamlet invariable. Evidence of reputation respecting the latter, cannot therefore be made a medium of proving the former; and he cited *Starkie on Evidence*, vol. i. p. 156, 2nd ed., *Weeks v. Sparke* (a), *Doe v. Thomas* (b), *Richards v. Bassett* (c), *Talbot v. Lewis* (d), *Crease v. Barrett* (e), *Rex v. Antrobus* (f).

(a) 1 M. & S. 679.

(d) 1 C. M. & R. 495.

(b) 14 East, 323, & n., 327 *et seq.*

(e) 1 C. M. & R. 919.

(c) 10 B. & C. 657.

(f) 2 Ad. & E. 788.

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LORD DENMAN C. J.—It appears to me, that if it was legitimately shewn that the boundaries of the hamlet and farm were identical, any legitimate mode of proving the boundary of the hamlet then became admissible as a medium of proving the boundary of the farm. Here the question of identity was asked of the witness and answered affirmatively; this was sufficient evidence of identity to be left to the jury, and upon that evidence the farther question might be asked; just as if, on the sale of an estate, the parties had themselves defined the boundary by reference to a parish boundary.

PATTESON J. (a)—It must be conceded, that if it had been admitted in the case that the boundaries of the hamlet and farm were identical, proof of the boundary of the hamlet, by reputation, would have been admissible: but the question here is, whether such proof can be admitted, unless the identity in question be conclusively proved. I think, as soon as any evidence as to identity had been offered, and received without being objected to, the proof by reputation as to the hamlet boundary became immediately admissible. If the evidence of identity had been itself merely founded on reputation, it could not have been received, but that was not the case.

COLERIDGE J.—If the boundary of the hamlet had been the question at issue between the parties, reputation would have been admissible; if it is a fact relevant to that issue, it may be proved by the same means.

Rule refused.

(a) *Littledale J.* was absent.

Tuesday,
April 25th.

TOMLINSON v. GELL.

A suit in
Chancery was
pending be-
tween *A.* and
B., which *C.*

DECLARATION stated, that before the making of the promise of the defendant thereafter mentioned, certain conducted for *A.*, as *A.*'s attorney. An agreement was made between *B.* and *C.*, with the consent of *A.*, purporting that in consideration of the suit being put an end to, *B.*, the defendant in equity, promised to pay *C.*, the attorney, the costs due to him from *A.*, the plaintiff in the Chancery suit. Held, that this was an agreement by *B.*, the defendant, to pay the debt of another, and therefore that it ought to be in writing.

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disputes had arisen and were depending between one *William Buxton* and *Ann* his wife, and the defendant, as executor of the last will and testament of a certain person then deceased, and that a certain suit and proceedings had been lawfully commenced and instituted on the behalf of the said *William Buxton* and *Ann* his wife, in the Court of Chancery, against the defendant, as such executor as aforesaid, for the purpose of compelling the defendant to render an account of certain monies which had been received by him as such executor as aforesaid, and claimed to be due and owing to *William Buxton* and *Ann* his wife; That the plaintiff had been retained and employed as solicitor for the said *William Buxton* and *Ann* his wife, in the said suit, and certain costs had become due and payable to the plaintiff, as such solicitor as aforesaid, in the course of the suit, to the amount of 30*l.*; and the plaintiff was then about further to prosecute the suit and proceedings for and on behalf of the said *William Buxton* and *Ann* his wife, as such solicitor as aforesaid, and at their request, against the defendant as such executor as aforesaid, for recovery of the sums claimed by the said *William Buxton* and *Ann* his wife, from the defendant, as such executor as aforesaid, and of the costs incurred in the course of the suit: And thereupon, on &c., in consideration of the premises, and for the purpose of putting an end to all differences between the said *William Buxton* and *Ann* his wife, and said defendant, as such executor as aforesaid, it was agreed by and between the plaintiff and the said defendant, by and with the consent of *William Buxton* and *Ann* his wife, that all further proceedings in the suit should be stayed, and that the defendant should pay to the plaintiff the costs and charges which had become due to the plaintiff as such solicitor as aforesaid, and thereupon, on &c., in consideration of the premises, and that the plaintiff and *William Buxton* and *Ann* his wife, at the request of the defendant, had consented and agreed that the said suit and proceedings should be stayed and put an end to, in consideration that plaintiff had

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agreed to accept and receive from the defendant the costs so incurred as aforesaid, in order to put an end to the suit and proceedings, the defendant promised the plaintiff to pay to the plaintiff the costs which had so become due and payable to him as aforesaid, on the 17th day of August then instant. Averment, that the plaintiff did cause the suit to be discontinued, and the proceedings had ceased, and the 17th day of August had elapsed ; yet, &c. the defendant had not paid the 30*l.*, and the plaintiff had been wholly prevented from recovering the costs so payable to him. The fourth plea was as follows : that the supposed promise of the defendant was a special promise to answer for the debt of another person, and that there was not nor is any memorandum or notice in writing of the said promise, and of the consideration thereof, as required by the statute in that behalf made and provided, and this he is ready to verify.

Special demurrer to the fourth plea, and joinder. The cause stated in the margin of the demurrer for argument, was, that the promise in the declaration named, is not a special promise to answer the debt of another, within the meaning of the Statute of Frauds.

Kelly, in support of the demurrer. It is a fallacy to assume that the promise in the declaration is to answer the debt of another. It is a promise founded on a good consideration to pay a new debt. A suit existed, in which there were three parties substantially interested, the plaintiff, the defendant, and Mr. and Mrs. *Buxton* : the putting an end to this suit is the consideration on which the defendant promises to pay the plaintiff the costs that had been incurred in the suit. [*Coleridge J.* It is the plaintiff in equity, and not the plaintiff here, who puts an end to the suit.] It was an agreement between all three parties ; the plaintiff in this action was the attorney of the plaintiff in the Chancery suit, and had a lien on whatever costs the defendant might have to pay the original plaintiffs. Here are, therefore, three

parties coming together with different claims, and it makes no difference to the defendant, whether he should pay Mr. and Mrs. *Buxton* the costs, or hand them over to the plaintiff. [Lord *Denman*, C. J. What right did the plaintiff give up, by entering into this agreement, for he has still his remedy against his clients?] The plaintiff gave up the lien which he had on the costs that might be paid to his clients. Suppose *A.* owed *B.* 50*l.* and was sued for it, and that *C.* was liable for the costs of *A.* in the action, if *C.* to get rid of his liability, agrees to pay *B.* a sum of money, that would be clearly a good consideration to found an assumpsit. It is within the principle of *Williams v. Leper (a)*. There, a broker who was about to sell the effects of a tenant under a bill of sale, agreed to pay the landlord his arrears of rent, if he would desist from distraining. It was contended that this was a promise for the debt of another person, and therefore that it ought to be in writing. Lord *Mansfield*, however, ruled, that it had nothing to do with the Statute of Frauds. [Cleridge J. In that case the decision proceeded on the ground of the goods being the debtor's, and that, as the landlord had a lien on them, the amount which the goods fetched might have been recovered as money had and received. Here the *Buxtons* are still liable.] To satisfy the Statute of Frauds, it is only necessary that there should be a new consideration. [Patteson J. In *Goodman v. Chase (b)*, a promise to pay the debt of another, on condition of that other being discharged out of custody on a *ca. sa.*, was held to be an original promise, but that was on the ground of the principal debt being discharged by the release out of custody.] It is contended here, that there never was a debt of a third person, for it is laid down in some of the old books (c), that if an attorney commence the conduct of an action for his client, he cannot throw it up in the middle; the plaintiff therefore had no debt which he could have recovered from his clients, at the

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(a) 3 Burr. 1886.

Solomon, Sayer, 172; *Cresswell v.*

(b) 1 B. & Ald. 297.

Byron, 14 Ves. 271. But see *Van*

(c) See 1 Sid. 31. *Mordecai v.*

Sanden v. Browne, 9 Bingh. 402.

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time of the agreement, and the debt only accrued for the first time at the termination of the suit by that agreement. [*Patteson J.* In *Taylor v. Watson* (a) it was held, that an undertaking to pay the costs of the plaintiff's attorney, in a cause pending, in consideration that the plaintiff would, with the attorney's consent, authorize the defendant to pay over the debt sued for to a creditor of the plaintiff's, is not binding. That case was before the new rules, and therefore the point, of the promise not being in writing, was not raised on the record; besides, I recollect the promise was in writing.] That decision must have proceeded on the ground that no consideration moved from the plaintiff. There was a case in Michaelmas term last (b), in which the question of consideration was considered. A Mr. Wood had become indebted to the plaintiff in 100*l.*, which he remitted to the defendant, who was a jeweller, to pay to the plaintiff; the defendant promised plaintiff to pay him; there was no other privity between them; and it was contended that no consideration moved from the plaintiff. The Court, however, thought it a good consideration. *Bampton v. Paulin* (c) is an authority confirming *Williams v. Leper* (d), and these two cases clearly shew that a promise like the present, although a third party may have been liable, need not be in writing.

Platt contra, It is impossible to contend on this record, that the principal debtor does not remain liable, and therefore the promise is clearly to pay the debt of another. Suppose the defendant had owed *Buxton* 50*l.*, and that *Buxton* owed the plaintiff 20*l.*, which the defendant agreed to pay to plaintiff, undoubtedly the promise must have been in writing; that is the present case couched in different terms. (He was then stopped by the Court.)

Lord DENMAN C. J.—We are all agreed upon this

(a) 4 Mann. & Ryl. 259.

(c) 4 Bingham. 264.

(b) *Lilly v. Hays*, ante, 1 N.

(d) 3 Burr. 1886.

& Perry, 26.

point. It is very difficult to say that there was any consideration for the promise made by the defendant, as one does not perceive either what the plaintiff gave up, or what the defendant gained by it. But, at all events, it was a promise to answer for the debt of another.

The declaration states, that a suit in Chancery was pending between the *Buxtons* and the defendant, and that there was an agreement to put an end to it, on the defendant paying the plaintiff the costs which were due to the plaintiff from the *Buxtons*, for conducting their suit. It is evidently quite uncertain what the event of the suit would have been, but, whatever its event, the *Buxtons* would have been liable for their costs to the plaintiff; and, as far as appears on the record, that liability still exists. The promise, therefore, made by the defendant, was undoubtedly a promise to pay the debt of *Buxton*, and as that promise was not in writing, judgment must be for the defendant.

LITLEDALE J.—The case appears to me to be this. The plaintiffs in equity having a claim against the defendant, the parties agree to put an end to that suit on the defendant paying the costs which the plaintiffs in equity had incurred. Now, if this promise had been made between the parties immediately, there is no doubt there would have been a new consideration. But the attorney to the *Buxtons* is also a party to the agreement, and he says that, inasmuch as he has a lien on the costs to be paid to his clients, and that the *Buxtons* will have to hand the costs paid by the defendant over to him, the defendant shall promise to pay the costs directly to him. The attorney certainly is a party concerned, and it makes no difference to the defendant, whether he pays *Buxton* or the plaintiff. But then comes the operation of the rule of law, that a promise to pay the debt of another must be in writing; and although this case certainly differs from the majority of the cases which have arisen on this point, where the plaintiff has been generally an entire stranger to both parties, the

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debt, in this case, certainly was the debt of another, and not being in writing cannot be enforced.

PATTESON J.—The question on the last plea turns entirely on the Statute of Frauds, namely, whether the promise was to pay the debt of another person or not. It is quite clear that *originally* it was the debt of another, as the plaintiff could have no right to sue the defendant for the costs of the Chancery suit. For those costs his own client only was liable, and there is nothing on this record to shew that his own client is not liable still, or that the plaintiff substituted the defendant for the original debtor. Mr. *Kelly* says, however, that it is not an undertaking to answer the debt of another, because a sufficient consideration presented itself, by the putting an end to the Chancery suit, to found an original promise. It does not appear to me that there was any such consideration here. In the cases in which it has been held that the promise to pay the debt of another need not be in writing, some sacrifice has been made by the plaintiff, such as giving up a lien, or the original debt, as in *Goodman v. Chase*(a), where the Court held the promise to be original, and not collateral, entirely on the ground of the discharge out of custody being a satisfaction of the first debt. The other point raised, as to the consideration, struck me, during the argument, by its resemblance to the case of *Taylor v. Walters*(b), but it is not necessary to discuss it further now.

COLERIDGE J.—The only point that weighed at all with me, during the argument for the plaintiff, was, that prior to the agreement being made, there never was a debt due from the *Buxtons*, and therefore that the promise made by the defendant was an original contract. On looking, however, at the declaration, it appears that the plaintiff had been retained by the *Buxtons*. At that time, therefore,

(a) 1 B. & Ald. 297.

(b) 4 Mann. & Ryl. 259.

certain costs were due from the *Buxtons* to the plaintiff, and it is clear, from the declaration, that that liability still subsists.

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Judgment for the defendant (a).

(a) See Viner's Abr. Attorney, R. pl. 3.—If another promises to pay the costs of an attorney, due from a third party, yet he for whom the plaintiff is attorney on

the record, is not discharged, and therefore the other cannot, in that case, be liable to an indebitatus; per *Holl* C. J., 7 Mod. 149.

MINTER v. MOWER.

CASE for the infringement of a patent. Pleas: first, not guilty; second, that the supposed invention or improvement was not new; third, that the specification of the plaintiff (which was set out in the plea) did not particularly describe or ascertain the nature of the said invention or improvement in the said letters-patent, or in what manner the same was to be performed. At the trial before Lord Denman C. J. and a special jury, at the sittings in London after Trinity term 1835, it appeared that the plaintiff had obtained letters-patent, bearing date 9th November, 1831, "for an improvement in the construction, making or manufacturing of chairs, which he intended to denominate "*Minter's Patent Reclining Chair*." In his specification he described the nature of his invention in these terms,—“My invention of an improvement in the construction, making or manufacturing of chairs, consists in the application of a self-adjusting leverage to the back and seat of a chair, whereby the weight on the seat acts as a counterbalance to the pressure against the back of such chair, and whereby a person sitting or reclining in such chair, may, by pressing against the back, cause it to take any inclination, and yet at the same time the back of such chair shall, in whatever position it is

Where the specification of letters-patent claimed as an "*invention*" the application of a self-adjusting leverage to the back and seat of a chair, whereby the weight on the seat acts as a counterbalance to the pressure against the back," and it appeared that *A.*, previously to the letters-patent, had made and sold chairs, in which the same principle was applied, but which could not be called into action without the use of additional machinery:—

Held, that the patent could not be supported, as it claimed too much, and would have prevented *A.* from making the chairs he had made formerly.

Semble, That a patent for an improvement of *A.*'s chair, would have been valid.

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placed, offer sufficient resistance and give proper support to the person so sitting or reclining in such chair." He then described the various parts of the chair, and concluded thus:—"I would have it understood that I lay no claim to the separate parts of a chair which are already known and in use, neither do I confine myself to making them in the precise shapes or forms represented, but what I claim is, my invention in the application of a self-adjusting leverage to the back and seat of a chair, whereby the weight on the seat acts as a counterbalance to the pressure against the back of such chair, as above described."

At the trial it appeared that the back of *Minter's* chair became recumbent upon the sitter's leaning against it, and that it resumed its original position, on the sitter's withdrawing the pressure of his back: it was also proved that the chair sold by the defendant was identical in principle with the plaintiff's; but the defence set up was, that a working cabinet-maker of the name of *Brown* had applied the same principle of a self-adjusting leverage to chairs, previous to the plaintiff having taken out his patent in 1831, and that *Brown* had made and sold two or three of such chairs in 1829. A chair made by *Brown*, in 1829, was produced at the trial. It had been altered from its original form, and it appeared in evidence that the chair made by *Brown* did not move by the spontaneous motion of the sitter, but required pressure on a pad placed on the arm of the chair, communicating with a rack and pinion, which had the effect of fixing the back at the angle desired; and to restore the back to its original position, it was requisite to relieve the spring of the rack and pinion; it was proved, however, that if the pad and spring connected with it were removed, the chair would then act by the spontaneous motion of the sitter, like the plaintiff's. The rack and pinion of *Brown's* chair acted as a stop, and there was contradictory evidence as to its utility. Lord *Denman* C. J. left it to the jury to say, whether *Brown's* chair would have acted like the plaintiff's, if the pad had been taken away. They found that it

would. His lordship then asked them to say whether they were satisfied that *Brown* knew the practical purposes to which his chair might be applied. The jury found that *Brown* was the inventor of the machine, and had discovered the principle, but was not aware of the practical purposes to which it might be applied. His lordship, upon this finding, directed the verdict to be entered for the plaintiff, and gave the defendant leave to move to enter a nonsuit. A rule having been obtained by *Talfourd* Serjt., in Michaelmas term, 1835, to set aside this verdict, and to enter a nonsuit, cause was shown in Hilary term last (*a*), against this rule, by

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Sir *J. Campbell* A. G., Sir *F. Pollock*, and *J. Evans*. This patent has been already before the Court (*b*), and has been sustained both in principle and by the verdict of a jury. In this case, the jury have found that the principle of the self-adjusting leverage was known to *Brown*, but the patent is taken out for the application of that principle; the finding of the jury, therefore, as to the knowledge of *Brown*, is immaterial, unless it were shown that he had applied that principle. No doubt a chair with a back moving backwards and forwards by a compound lever, according to the pressure on the seat, was in *posse*, but the question is, whether the plaintiff was not the first to apply that principle to a chair. The title of the patent here must be connected with the specification. Now the title is for an *improvement* in the construction of a chair, and the improvement is shown in the specification to consist in the application of a self-adjusting leverage to the back. *Minter's* chair is acknowledged to be a great improvement. But it is contended the patent is too large, and that the specification is not adapted to the chair invented by the plaintiff, as in *Brown's* chair there

(*a*) Jan. 19th, before Lord Denman C. J., *Patteson* J. and *Williams* J. *Coleridge* J. being absent from indisposition.

(*b*) *Minter* v. *Wells*, 5 Tyrr. 163; S. C. 1 C. M. & R. 505. See *Minter* v. *Williams*, 5 Nev. & M. 647.

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is also the application of a self-adjusting leverage. It is admitted that the chair sold by the defendant is identical in principle with the plaintiff's, and that if the patent of the latter is valid, that the defendant's chair is an infringement. The objection to the patent is, that *Brown's* chair is the same as the plaintiff's, but *Brown's* chair is only to be moved by a rack and pinion working under the arm, with a pad sliding on the arm, and the position of the back, after being placed in a recumbent position, could only be restored by the sitter drawing himself up by the sliding pad; *Brown's* chair therefore did not work by pressure only, like the plaintiff's. Lord *Lyndhurst* C.B. said, in *Minter v. Wells* (a), "Every invention of a machine necessarily includes the application of some principle, and in this instance the application of the principle of a lever to the back and seat of a chair is the machine, the invention of which is claimed by the plaintiff. He has not summed up the extent of his invention, so as to include in it the principle of the lever, but merely the invention of applying it in the manner specified." The objection to be taken to the plaintiff's patent must be, either that it is for the application of a principle which was already known, or that it was taken out for a mode of applying that principle, and that the defendant had not copied that mode. But a slight variation in the mode of applying a principle, does not make the imitation less a piracy. There is a note to *Minter v. Wells*, in 5 Tyr. 163, not unimportant to the present case. It states, that an affidavit was presented to the Court, stating that *Litton* was the original inventor of the chair; but Lord *Lyndhurst* said that is not conclusive. Till the plaintiff's chair, there never was one that moved by pressure only, and supposing that other chairs previously had contained that principle of moving by pressure, which had never been called into action, but which was enumerated with other movements, would it be less an invention to discover that a chair could

(a) 5 Tyr. 163—5; 1 C., M. & R. 505.

be made to move freely and at the will of the party sitting in it, without those encumbering parts? Is it not often as great an invention to discover what may be left out of a manufacture, to produce a given result, as to discover what may be added with advantage? The decision of *Jones v. Pearce* (a), cor. *Patteson J.*, is quite in accordance with this view. There the plaintiff took out a patent for iron carriage wheels, on the principle of suspension, and it was proved that Mr. *Strutt*, at Derby, had had wheels made on a similar principle 18 or 20 years before. *Patteson J.* told the jury, that if they thought Mr. *Strutt's* was only an experiment, and that he found it did not answer, and abandoned it as useless, then the patent might be supported. If *Minter* had seen all the chairs that *Brown* had made, he would still be entitled to his patent, which is for the application of a principle, in a mode never contemplated by *Brown*.

It is not sufficient even that *Brown* knew the principle of the self-adjusting leverage applied to chairs, because it was held in *Dollond's* case, referred to in *Boulton v. Wall* (b), that although Dr. *Hall* knew *Dollond's* method of making object glasses before *Dollond* had taken out his patent, yet that not having made it public, *Dollond* was to be considered the inventor. The finding of the jury, therefore, as to *Brown's* knowledge of the principle, is immaterial, as he had not made that principle public.

Talfourd Serjt. and *Godson*, contrâ. It may be admitted for the present argument, that the defendant's chair is identical with the plaintiff's, though in truth it is different both in the machinery and in the result produced. But it is important to know how much the plaintiff claims. Supposing, therefore, *Brown's* chair, with the leverage in the back, was made before the plaintiff took out his patent, can the plaintiff restrain him from making that chair now? can he say, it is true your chair contains some slight variations, a rack

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(a) Gods. on Pat. Supp. 10.

(b) 2 H. Bla. 470 & 487.

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and pinion, a pad &c., but those are unimportant parts, and it really is moved by the same principle, the same self-adjusting leverage as mine, and therefore is an infringement of the patent which I have taken out. It is clear that the plaintiff can do this, if *Minter v. Wells* (a) is to be supported; for Lord *Lyndhurst* said there, "Any machine applying a self-adjusting lever to the back and seat of a chair, by which the effect of one counterbalancing the other is produced, would be an infringement of this patent." Now it is clear from the evidence, that *Brown's* chair would act as a self-adjusting lever, when the spring was relieved. It follows therefore necessarily, that if *Brown's* chair, acting in this way, is an infringement on the plaintiff's patent, it is no infringement if it was invented and published previously. *Brown's* chair may be divided into two parts; first, that consisting of the leverage; second, that consisting of the spring and stop. The jury have found expressly that the plaintiff has invented nothing, but merely has left out the spring and stop. The question therefore really is, whether if a party invents a mode consisting of A + B, to produce a given result, a patent taken out for A - B can be supported, A being the main principle, and B being found to be useless. It may be admitted, that if B prevented the full action of, and were an impediment to A, that a patent for A - B would be good, but the defendant showed clearly, that directly the pressure on the spring of his chair was relieved, the compound lever of the back came into full play, and his chair became identical with the plaintiff's. The jury had found that *Brown* did not know that A could not act without B, but it seems impossible to conceive how a person of mechanical genius should not be acquainted with the moving principle of his own invention, which he saw daily in operation before his eyes.

The plaintiff describes his invention in the specification, to be the application of a self-adjusting leverage to the back and seat of a chair, and it is contended that *Brown* had never

(a) 5 Tyr. 163; S. C. 1 C. M. & R. 505.

applied the leverage in the mode pointed out by the plaintiff, but if it is the mode which is claimed in the specification, it is not sufficient, for the plaintiff has not taken out a patent for an improvement in the application of a self-adjusting lever, but for the application only. A juryman asked at the trial, if the patent was taken out for an improvement in applying the principle, and Lord *Denman* read the passage to him in the specification, describing the invention, in which not a word is said of improvement. It is true the title of the patent contains that word, but it is for an improvement in the construction of chairs, by the application of a self-adjusting leverage. It is clear, therefore, that the patent is taken out solely for this application. *Dollond's* case, which has been cited, is clearly inapplicable, for the reason why *Brown* made no more chairs after 1829-30, was, that the patent was taken out, and therefore it is quite unlike those cases in which a discovery has been made and thrown aside as useless, as in *Jones v. Pearce* (a), *Leves v. Davis* (b), *Lewis v. Murting* (c). [Lord *Denman* C.J. You need not trouble yourself on that point, as we are of opinion that the making and selling one chair would be a sufficient publication under the circumstances (d).]

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Cur. adv. vult.

LORD DENMAN C. J., in the course of this term, delivered judgment:—An action between the same parties has already been decided by the Court of Exchequer, in which the patent claimed by the plaintiff was deemed good and valid. But on the trial in this Court, an entirely new fact was given in evidence, and affirmed by the verdict of the jury, namely, that a chair, very closely resembling that made by the plaintiff's patent, had been made and sold before that patent was taken out. The words of the jury were these, "We are of opinion that *Brown* was the inventor of the

(a) Gods. on Pat. Supp. 10.

(c) 4 C. & P. 52.

(b) 3 C. & P. 502.

(d) See Gods on Pat. 61.

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machine, and found out the principle, but not the practical purpose to which it is now applied; we think that *Minter* (the plaintiff) made that discovery."

This statement might not be fatal to the plaintiff's title, if his invention were truly set forth in the specification, but the issue in this cause being simply whether the plaintiff did thereby particularly describe and ascertain the nature of the said invention, we find it needful to examine the terms of it. Now the patent is taken out for "an improvement in the construction, making, or manufacturing of chairs." The method of making the machine, and the way in which it acts, are then fully described, without any mention of any of the means employed in *Brown's* chair. The specification thus concludes:—"What I claim as my invention is, the application of a self-adjusting leverage to the back and seat of a chair, whereby the weight on the seat acts as a counterbalance to the pressure against the back of such chair, as above described." Now it was perfectly clear upon the evidence, that this description applies to *Brown's* chair, though that was encumbered with some additional machinery. The specification therefore claimed more than the plaintiff had invented, and would have actually precluded Mr. *Brown* from continuing to make the same chair that he had made before the patentee's discovery. We are far from thinking that the patentee might not have established his title, by showing that a part of *Brown's* chair could have effected that for which the whole was designed. But his claim is not for an improvement upon *Brown's* leverage, but for a leverage so described that the description comprehended *Brown's*. We are therefore of opinion that the patent cannot be sustained, and a nonsuit must be entered.

Rule absolute.



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The KING v. The Inhabitants of EXMINSTER.

UPON an appeal against an order for the removal of *Elizabeth Matthews* from Dawlish to Exminster, the sessions confirmed the order, subject to a case, which, after stating that the pauper was bound apprentice, in 1826, to Mr. *Robert Trood*, of Exminster, and assigned in the same year to the Rev. *Thomas Melhuish*, of the same parish, proceeded as follows:

" Another instrument, purporting to be an assignment, bearing date 8th October, 1830, was made by and with the consent of two justices, testified under their hands, which is in the words following: ' Devon to wit: Whereas it appears unto us, two of his majesty's justices of the peace for the said county, whose names are subscribed to the consent hereunder written, that *Elizabeth Matthews* was bound a parish apprentice by the churchwardens and overseers of the poor of the parish of Exminster, in the said county (reciting the indenture and former assignment): Now be it remembered, that the said *Thomas Melhuish*, by and with the consent and approbation of two of his majesty's justices of the peace for the said county, whose names are subscribed to the consent hereunder written, doth hereby assign *Elizabeth Matthews*, the apprentice above-named, unto *Moses Paul*, of the parish of Dawlish, to serve him during the residue of the term above-mentioned. And that he the said *Moses Paul* doth hereby agree to accept the said *Elizabeth Melhuish* as an apprentice for the residue of the said term: and doth hereby acknowledge himself, his executors and administrators, to be bound by the agreements and covenants mentioned in the said indenture, on the part of the said *Robert Trood* to be done and performed, according to the true intent and meaning of the said indenture, and pursuant to the provisions of an act passed in the 32d year of the reign of King *George 3*,

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Assignment and acceptance of a parish apprentice, in the following words, " the said *T. M.* doth hereby assign the said *Elizabeth Matthews* (the apprentice named in the indenture), and the said *M. P.* doth hereby agree to accept the said *Elizabeth Melhuish*:" Held, that the misnomer did not render the acceptance a nullity.

2. When a parish apprentice is bound into another parish, by assignment of the indenture of apprenticeship, notice from the churchwardens and overseers of the first parish, to those of the second, is not requisite under 56 Geo. 3, c. 139, s. 2.

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intituled, 'An Act for the further regulation of Parish Apprentices.'" (Signed by the parties and two justices.)

Under the instrument above set out, the pauper served the said *Moses Paul*, in the said parish of Dawlish, where she resided during such service more than forty days. No notice was ever given by the churchwardens and overseers of Dawlish aforesaid, or any of them, to the churchwardens and overseers of Exminster aforesaid, or any of them, of the instrument above-stated.

The questions submitted to the Court are, 1. Whether without such evidence there were any sufficient acceptance of the said pauper by the said *Moses Paul*, as is required by 32 Geo. 3, c. 57, s. 7. 2. If not, whether the Court ought not to have admitted parol evidence. 3. Whether it was necessary that the churchwardens and overseers of Exminster should have given notice to the churchwardens and overseers of Dawlish, in order that the pauper, by virtue of the instrument above set out, and service thereunder, should gain a settlement in Dawlish.

Merivale, in support of the order of sessions. Under the 32 Geo. 3, c. 57, s. 7, the person to whom an apprentice is duly assigned, with the consent of two justices, is required "by indorsement on the counterpart of the indenture, or by writing under his hand, stating the indenture and indorsement and consent aforesaid, to declare his acceptance of such apprentice." The question here is, whether the acceptance, containing a different name from that in the assignment, is valid. Undoubtedly there are here words of reference to connect the two names together. And the general principle appears to be, that a Court may disregard such errors as the present, if it is able, by fair construction, to collect the intention of the parties. But this rule is not to be considered as universal; and an instrument extremely inaccurate in respect of names, will be held void, although the inaccuracies are not such as to throw the least doubt

on its meaning. Thus, in *Holding v. Raphael* (a), a bail-bond was held a nullity, which had been executed without filling up the blank spaces left for the name of the party to whom the copy of the writ had been delivered, and for the name of the party on whose putting in special bail the action was to be void; although the name had been inserted in full in the recital of the arrest; and the words of reference, "the said," were inserted immediately before the blanks. 2. It is clear that if this is not an error which can be holpen by the intention of the parties, collected from the instrument itself, the Court was right in rejecting parol evidence to explain it. This is a case of an ambiguity or inconsistency apparent on the face of the instrument, which cannot be holpen by parol averments (b). 3. By the stat. 56 Geo. 3, c. 139, s. 2, it is enacted, "that notice shall be given to overseers of the poor of any parish or place in which such child shall be intended to serve an apprenticeship, before any justice of the peace of the county or district within which such parish or place shall be, shall allow such indenture." In the case of *Rex v. Newark on Trent* (c), it was held, that this provision applied to the case where the parish into which the child was to be bound was in a different jurisdiction, though in the same county; and *Rex v. Threlkeld* (d) carried it further, and rendered the notice necessary in all cases where the child was bound into a different parish. The words of Lord Denman C. J. in that case are, "The object of the legislature being, as may be collected from the preamble, that every possible precaution should be taken in the binding out of the poor apprentice, it is manifest that the same necessity for notice may exist as in the other case." The same necessity clearly exists in a new binding by assignment, as in a binding by indenture; the case is within the reason, if not the words, of the sta-

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(a) 5 Nev. & Man. 655.

Stark. on Evidence, ii. 546, 2d ed.

(b) Bacon's Elements, rule 23;

(c) 3 B. & C. 59.

1 Phill. on Evidence, 519, 6th ed.;

(d) 4 B. & Ad. 229.

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tute: notice ought to have been given to the churchwardens and overseers.

Terrell, contra, was stopped by the Court.

Lord DENMAN C. J.—I am of opinion that this was a sufficient acceptance of *Elizabeth Matthews*, the intention being clearly manifested. On the other point I think we are bound by the words of the 56 *Geo. 3. c. 139*. It might be desirable that notice should be given on a binding into another parish, by means of an assignment: but the statute has only required it in the case of a binding by indenture.

LITLEDALE J., PATTESON J., and COLERIDGE J., concurred.

Order of Sessions quashed.

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The KING v. The Inhabitants of KIMBOLTON.

1. Under s. 81 of the Poor Laws' Amendment Act (4 & 5 W. 4, c. 76), delivery of the statement of grounds of appeal, against an order of removal, to an attorney acting on behalf of the overseers of the respondent parish, is insufficient.

2. Where no statement of the grounds of an appeal has been delivered to the overseers of the respondent parish, the sessions have jurisdiction to respite the appeal.

UPON an appeal against an order for the removal of *Mary Phillips*, the wife of *Richard Phillips*, a convicted felon, and her four children, from the parish of Kimbolton, in the county of Hereford, to the borough of Leominster, in the same county, the sessions adjourned the appeal, subject to the opinion of this Court upon the following case:

When the appeal was called on, the appellants proved that notice of appeal was served upon the churchwardens and overseers of Kimbolton on the 10th September, 1835, and that on the 3d of October following, the attorney for the appellants served a statement of the grounds of appeal, signed by the churchwardens and overseers of Leominster aforesaid, upon an attorney of the name of *Dipple*, as at-

the overseers of the respondent parish, the sessions have jurisdiction to respite the appeal.

torney for the churchwardens and overseers of Kimbolton, who accepted the same on their behalf. It was objected by the counsel for the respondents, that assuming that Mr. *Dipple* was actually the attorney employed by the respondents in this appeal (which the respondents said they were able to disprove), still the service of such statement of the grounds of appeal was insufficient, as the statement was not served upon the overseers themselves, pursuant to 4 & 5 Will. 4, c. 76, s. 81; and the sessions were of this opinion. Whereupon the counsel for the appellants applied to the Court to adjourn the said appeal to the next sessions, in order that it might then be heard: which, after argument, the Court ordered to be done.

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The question, therefore, for the opinion of the Court of King's Bench is, whether under these circumstances the sessions had power and jurisdiction to adjourn the said appeal as aforesaid.

Greaves, in support of the order of sessions. The sessions in this case had not only jurisdiction to adjourn, but were bound so to do. The first statute on the subject is 13 & 14 Car. 2, c. 12. Sec. 2 of that statute gives parties aggrieved by the judgment of two justices, the general power of appealing to the court of quarter sessions: and no notice of appeal is required by that statute. Then comes 9 Geo. 1, c. 7, s. 8, which enacts that no such appeal shall be proceeded upon unless "reasonable notice" be given; and in case such notice shall not be given, then the sessions *shall* adjourn the appeal to the next sessions. Under that statute, where such notice as by the practice of the Court was deemed "reasonable," was not given, the Court was bound to adjourn: *Rex v. Justices of Buckinghamshire* (a); *Rex v. Justices of Staffordshire* (b). Then the 4 & 5 Will. 4, c. 76, s. 81, introduces an additional requisite before the appeal can be proceeded with, viz. the notice of the grounds of appeal. Now, sect. 81 of that act, being in *pari materiâ*

(a) 3 East, 342.

(b) 7 East, 549.

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with 9 *Geo. 1*, c. 7, s. 8, must be read together with it, and the case will stand as if the grounds of appeal were required to be stated in the notice by 9 *Geo. 1*, c. 7, s. 8. Many cases shew that a former statute is to be construed to override a subsequent one. Thus in *Vernon's case* (a), it is laid down, that "it is frequent in our books, that an act made of late time shall be taken with the equity of an act made long time before." In *Bennet v. Edwards* (b), it was held, that an assistant overseer was liable to the penalties imposed by the 17 *Geo. 2*, c. 3, s. 3, although such office was only created by the 59 *Geo. 3*, c. 12, s. 9. *Farr v. Hollis* (c), and *Wilkes v. Williams* (d), are to the same effect. [*Patteson J.* The statement of the grounds of appeal is evidently to be considered as a separate instrument from the notice of appeal itself.] In practice it is usual to give them in the same instrument. [*Patteson J.* The new statute has altered the state of things. The statement of grounds of appeal must be given fourteen days before the sessions at which the appeal is to be entered. At some sessions "reasonable notice," under the former acts, was interpreted to mean ten days: there is therefore a difference as to the next practicable sessions.]

In the next place, the court of quarter sessions has at all events, in common with other courts, a discretionary power to adjourn, and has exercised that discretion rightly. It is assumed by the case, that the appeal was properly entered, for the only question stated is as to the adjournment. It is said in 2 *Nolan*, p. 536, that the justices have a power inherent in their jurisdiction, to adjourn appeals at discretion: *Rex v. Justices of Wilts* (e). [*Patteson J.* cited *Rex v. Oxfordshire* (f).] That case was distinguished from cases like this, both in the argument and the judgment. The ground of that decision was, that the statute of the 16 *Geo. 3*, c. 30, s. 21, required both notice and recognizance by the same section which gave the appeal, in such terms

(a) 4 Rep. 4, b.

(b) 1 M. & R. 482; 7 B. & C. 586.

(c) 4 M. & R. 230; 9 B. & C. 315.

(d) 8 T. R. 631.

(e) 13 East, 352.

(f) 1 M. & S. 446.

as to make the notice a condition precedent to the *entering* of the appeal. In the present instance it certainly is not, unless it can be said that the new statute renders it so; under 9 Geo. 1, it was evidently a condition subsequent. In *Rex v. Justices of Gloucestershire* (a), Lord Mansfield said, "The notice directed to be given by stat. 9 Geo. 1, does not go to the *receiving*, but to the *hearing*, of the appeal." Unless in this case the sessions could adjourn, there is an end to the former practice of entering and adjourning where no notice has been given. Lastly, the statement of grounds of appeal was rightly served on the attorney of the respondents. [Coleridge J. You should have moved for a mandamus to enter continuances and hear the appeal.] Either course was open to us. There is nothing in the act requiring personal service of the notice. Under the bankrupt acts it has been held, that where notice is given of the intention to dispute certain matters of fact in actions against the assignees, service of notice on the attorney or clerk of the assignees is good: 2 *Phillips on Evidence*, 328; *Widger v. Browning* (b). [Coleridge J. There the action is commenced. How can it be said that any person is attorney for the respondents in the appeal, when there is no appeal as yet existing?] The case states that he was attorney in this appeal, which was commenced by the previous notice. In an unreported case (*Rex v. Justices of Monmouthshire*, Hilary term, 1829); notice of appeal, signed by the attorney to the appellants, was held good. If then the statement of grounds of appeal was well served, the appeal was properly entered, even if such statement should be held to be a condition precedent to the entering of the appeal.

Godson, contra. If the position contended for on behalf of the appellants can be maintained, it is in their power, before next sessions, to give in a new statement of their grounds of appeal. The notice of appeal and statement of grounds are evidently distinct documents: *Rex v. Justices*

(a) 1 Dougl. 191; Cald. 283, n. (a).

(b) 1 Moo. & M. 27.

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of *Suffolk* (a). And supposing 9 Geo. 1, still to apply to the former, it is clearly inapplicable to the latter. The statute expressly says, that without a statement of grounds of appeal, the appellant cannot be heard : this must mean that the appeal shall be dismissed, not that the Court shall have power to entertain it and adjourn it. The case of *Rex v. The Justices of Oxfordshire* (b) goes to this extent, that if a notice be a condition precedent, parties neglecting to give it cannot be heard ; and in this case the statement is a condition precedent. Then as to the service of notice on the attorney. The case of *Rex v. The Justices of Monmouthshire* (c), cited on the other side, is very different from this. There the notice was signed by the attorney of the party giving it ; but the party so giving the notice thereby adopted the attorney ; in the present instance the respondents had as yet no attorney who could be served. [Coleridge J. Under section 79 of the act, notice of an order of removal must be served on the overseers themselves.] The intention of the legislature was no doubt the same as to both notices. The words are explicit.

LITLEDALE J. (d).—It seems to me that the sessions had power to adjourn. A general power to that effect is undoubtedly vested in them, and in every Court at common law. But it is said in this case, that it is useless for them to exercise it, because the statement of grounds is a condition precedent, and therefore, if it be a nullity, the appeal can never be heard. To that I cannot assent. The statute says that the appellants cannot be heard unless they have given a statement of grounds ; it does not say the appeal cannot be adjourned. With respect to the service of notice on the attorney, I think it insufficient. It does no doubt, in this instance, appear that the person so served was the attorney for the respondent parish in this appeal : but when

(a) 4 A. & E. 319.

(b) 1 M. & S. 446.

(c) Not reported.

(d) Lord Denman C. J. was at the Privy Council.

the service took place, the appeal was not, properly speaking, commenced. And at all events I think the service should have been on the overseers themselves. Under s. 79 of the same act, notice, preliminary to a removal, sent *by* an attorney, is insufficient; and on comparing that section with s. 81, the latter appears to require a similar interpretation. Under 41 *Geo. 3*, c. 23, s. 4, it is requisite that notice of appeal against a poor's rate should be signed by the persons giving it, *or their attorney*, and served on the churchwardens and overseers: this shews that where it is intended that the signing of notice by an attorney shall be equivalent to signing by the party, the legislature expresses that intention: and the same reasoning holds good as to service on the attorney.

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PATTESON J.—With respect to the service of this notice, I think we must abide by the letter of the act, and hold it insufficient. But the sessions had authority to adjourn, although not bound to do so in this instance, as they were under 9 *Geo. 1*, c. 7, which does not apply here. The act does not say that an appeal shall not be *received* if no statement of grounds is given, only that it shall not be heard: it is therefore within the general jurisdiction of the Court to adjourn it, and a new statement of grounds might be given fourteen days before the following sessions. The observations of Lord *Ellenborough*, in *The King v. The Justices of Wilts* (a) are particularly in point: the sessions have jurisdiction to adjourn where the appeal is properly lodged; and there is no doubt that it is so in this instance.

COLERIDGE J.—The only question is, whether the appeal was well lodged at the sessions. It appears to me that it was so. Supposing a removal had taken place so short a time before the sessions, that the Court could not try it, and the appellants could not deliver a statement, the Court might adjourn it to the next sessions, and that would

(a) 13 East, 352.

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be precisely the same case. In *Rex v. The Justices of Lincolnshire* (a), the question turned on the words of 49 Geo. 3, c. 68, s. 7, that no bastardy appeal is to be *brought, received, or heard*, unless notice be given pursuant to the act; and there the Court held, that such notice not having been given, the sessions could not *enter* the appeal: here the word is only "*heard*," which does not exclude a power to receive and enter: and then the power to adjourn is only that which every Court must incidentally exercise for the purpose of justice, unless restrained by express enactment. Under these circumstances I do not think it necessary for us to decide whether the notice was well served; but I am of opinion it was not.

Rule discharged, order of sessions confirmed, and case sent back to enter continuances to the next sessions.

(a) 3 B. & C. 548.

Friday,
 April 28th.

WEST, Clerk, v. TURNER, Clerk.

The 57 Geo. 3, c. 99, s. 53, enacts, that any difference arising between any rector and his curate, touching the stipend or allowance appointed to such curate under the provisions of the act, or the payment or arrears thereof, shall be summarily determined by the bishop: and s. 74 enacts, that no other jurisdiction, except that of the bishop, shall be exercised in any case where jurisdiction is given him by this act.

ASSUMPSIT for work and labour in preaching and celebrating divine service in the parish church of Luckington, Wilts, and upon an account stated.

Plea, as to second count, non assumpsit. To first count, that defendant is a clerk in holy orders, and rector of Luckington, in the diocese of Salisbury, and holds another benefice with cure of souls, within the meaning of 57 Geo. 3, c. 99; that defendant did not duly reside, whereupon plaintiff procured from the Bishop of Salisbury, and the bishop granted to the plaintiff, licence and authority, shall be summarily determined by the bishop: and s. 74 enacts, that no other jurisdiction, except that of the bishop, shall be exercised in any case where jurisdiction is given him by this act.

Held, in an action by curate against rector, for arrears of salary, 1, that these provisions of the statute were properly pleaded in bar, and not to the jurisdiction: 2, that it was not necessary to state in the plea the nature of the differences which arose.

rity to perform the office of stipendiary curate in the parish of Luckington, in reading the common prayers and performing other ecclesiastical duties, *and not otherwise or in any other manner*; and the bishop, by the licence in pursuance of the statute, assigned to the plaintiff the yearly stipend of 80*l.*, to be paid quarterly, for serving the cure, with surplice fees and use of rectory house, &c.; that the work and labour was done by the plaintiff *for and at the request of the defendant*, as in the declaration mentioned, under and by virtue of the licence, as such curate as therein mentioned, and not otherwise howsoever: that after the doing and bestowing thereof, as in the declaration mentioned, divers differences and disputes arose, and were and still are depending, between the plaintiff and the defendant touching and concerning the said stipend and the payment thereof, and the arrears thereof, in respect of the said work and labour and attendance; and that the action is brought touching and concerning the said stipend and the payment thereof, and of the arrears thereof as aforesaid, and to recover the same and payment thereof, and of the arrears thereof, in the respect of and touching which premises the said differences and disputes have arisen and are depending, within the meaning of the same statute, contrary to the tenor and effect of the statute. Verification.

The plaintiff demurred to the special plea, assigning several causes of demurrer:—

1. That the plea, though pleaded in bar, is, in effect, a plea to the jurisdiction.

2. That the jurisdiction of K. B. cannot be ousted without express words; whereas the 57 *Geo.* 3, c. 99, contains no such words.

3. That the plea admits a promise upon a valuable consideration moving from the plaintiff at the request of the defendant, and shews no excuse for the non-performance, but is directed to shewing that the services were performed *in invitum*, and without any request from the defendant.

4. That supposing the bishop has originally exclusive

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jurisdiction, the Courts of common law have jurisdiction in respect of the *promise* admitted.

5. That the plea is pleaded in denial of the matters of fact, from which the law implies a promise, and therefore amounts to non assumpsit.

6. That the plea does not state what differences or disputes arose, and were and are depending.

7. That the plea states no facts, the truth or falsehood of which being found, would enable the Court to say whether the plaintiff is entitled to recover.

8. That the plea, though it professes to admit the promise, is a multifarious denial of such promise.


9. That the plaintiff cannot take issue upon any of the facts stated, without admitting allegations which may be altogether unfounded.

Manning, in support of the demurrer. The case turns on sect. 48 (a) and sect. 53 (b) of 57 Geo. 3, c. 99. [*Pat-*

(a) The 57 Geo. 3, c. 99, s. 48, enacts that in case of non-residence within the provisions of the act, by any spiritual person holding a benefice, without leaving a curate duly licensed, or nominating to the bishop a proper curate, "then and in every such case, and in every case in which no curate shall be nominated to the bishop for the purpose of being licensed by him, within such period as aforesaid, the bishop is hereby authorized to appoint and license a proper curate, with such salary as by this act is allowed and directed."

(b) Sect. 53. "And be it further enacted, that it shall be lawful for the bishop, and he is hereby required, subject to the several provisions and restrictions in this act contained, to appoint to every

curate such salary as is allowed and specified in this act; and every licence to be granted to a stipendiary curate under this act shall contain and specify the amount of the salary allowed by the bishop to the curate; and such licence, or any copy of the registry thereof, signed by the registrar of the diocese or his deputy, shall be evidence of the salary so appointed to any curate in all Courts of law or equity; and in case any difference shall arise between any rector or vicar, or person holding any benefice, and his curate, touching such stipend or allowance, or the payment thereof, or of the arrears thereof, the bishop, on complaint to him made, may and shall summarily determine the same; and in case of wilful neglect and refusal to pay such stipend, salary

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teson J. It appears on the face of the plea that plaintiff was appointed by defendant; otherwise no contract could be alleged between them. Sect. 53 alone is material.] The first ground of demurrer is, that the plea should have been to the jurisdiction, and not in bar. The second, that the common law jurisdiction is not taken away by the statute. Sect. 53 enacts that the bishop's licence shall be evidence of the amount of salary in all Courts of law and equity. This shews that the jurisdiction of those Courts is still recognized as subsisting. [*Coleridge J.* Sect. 74 (a) enacts, that where the bishop has the jurisdiction, all other shall cease.] That section applies only to ecclesiastical matters, not to a dispute as to the payment of salary, so as to exclude the authority of this Court. The action is founded on a promise; the jurisdiction of the bishop is not on the promise, but on the original liability. The next material ground of demurrer is, that the pleader should have stated the nature of the differences and disputes which he alleges to have arisen. [*Coleridge J.* The words of the statute are extremely comprehensive; they give the bishop jurisdiction over *any* differences touching the stipend, payment, or arrears. There could therefore be no reason why the pleader should state the nature of the disputes in order to shew that they were within that jurisdiction.] It is submitted that for that very reason their nature ought to have been specified; the words of the statute being so

or allowance, or the arrears thereof, he shall be and is hereby empowered to proceed, by monition and sequestration, to sequester the profits of the benefice for and until payment of such stipend or allowance, or the arrears thereof."

(a) Sect. 74. "And be it further enacted, that in every case in which jurisdiction is given to the bishop of the diocese, or to any archbishop, under the provisions of this act and for the purposes thereof, and for the enforcing due

execution of the provisions thereof, all other and concurrent jurisdiction in respect thereof shall wholly cease, and no other jurisdiction in relation to the provision of this act shall be used, exercised or enforced, save and except such jurisdiction of the bishop and archbishop under this act: anything in any act or acts of parliament, and law or laws, or usage or custom to the contrary, notwithstanding."

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large, if the plea is not more specific, a plaintiff's attention is not sufficiently directed to the facts intended to be shewn. He might have been enabled to traverse the fact of the disputes if their nature had been stated; whereas, if the plaintiff had replied *de injuriâ* to the plea as it now stands, the defendant might set up one matter as being in dispute, and after the plaintiff had met the defendant's case upon that point, by shewing that the dispute in respect of that matter had been terminated, the defendant might set up totally distinct matter; and after being driven from his new position, he might have gone on with fresh matter, till he came to something which the plaintiff, from want of previous notice of the particular disputes meant to be set up, might not at the moment be prepared to answer.

Cowling, in support of the plea. It is correctly pleaded in bar. This is the proper form where the jurisdiction is entirely taken away by statute, and no new common law jurisdiction introduced. *Parker v. Elding* (a) shews that where a statute erects a local court, and enacts that no action shall lie for any debt under a certain amount, and recoverable within that act, against any person residing within that jurisdiction, such statute was formerly a defence on the general issue. At common law, if the bishop assigned the amount of salary, the curate's most effectual remedy was by sequestration, although, if he could prove an agreement, he might sue his incumbent at common law (b). The statute of 12 *Anne*, stat. 2, c. 12, s. 1, gave the bishop or ordinary power to hear and determine disputes between him and his incumbent. The present statute goes farther, taking away the common law jurisdiction. Nor will the supposed promise, on which the action is founded, support that jurisdiction: it is not express, but merely an implication of law. As to the next objection,—the pleader was not bound to mention specifically the matter in dis-

(a) 1 East, 352.

(b) 2 Burn's Eccl. Law, 8th ed.
 p. 68.

pute. It was not necessary in order to bring himself within the act, which gives the bishop jurisdiction in all cases of dispute which may arise on this subject. It might have been necessary to state these differences more particularly if this had been a plea in abatement, but certainly not in a plea of bar.

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Manning, in reply. The case in *1 East* was merely a rule nisi refused: the point as to the necessity of a plea to the jurisdiction was not raised, but it was merely objected that the defence ought to have been pleaded specially. [*Coleridge J.* referred to *Taylor v. Blair*, which is cited in the report of *Parker v. Elding (a)*.]

LORD DENMAN C. J.—The grounds of demurrer pressed on the Court are only two. There is no doubt that the jurisdiction of the Courts of common law is entirely taken away by sect. 74 of this act. The question is, whether that should not have been pleaded in the form of a plea to the jurisdiction. I apprehend it is enough to say that the act does not set up another court in exclusion of this; and that there is no court whatever in which this contract can be set up, because all disputes respecting the subject-matter of it are placed under the authority of the bishop. The case of *Parker v. Elding (a)* appears to have been decided by Lord *Kenyon* on a similar distinction, and is exactly in point with the present. As to the statement of the disputes, it is sufficiently precise to let in proof that there were disputes, and it was not necessary to specify the nature of them.

PATTESON J.—This is a transitory action; and it is laid down in *Tidd's Prac.* p. 631, (9th edit.) that the defendant in such an action cannot plead to the jurisdiction, unless in certain excepted cases. It is possible that this proposition may be laid down too generally; but here it is certainly appli-

(a) *1 East*, 352; *S. C.* 3 T. R. 452.

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cable. This is not a case in which another action is given by statute; but in which the right of bringing an action is altogether taken away. The words cited from sect. 53, that the licence shall be evidence of salary in all Courts of law and equity, are not sufficient to destroy the effect of the explicit provision in sect. 74. As to the other ground, the averment in the plea follows the very words of sect. 53, by stating that divers disputes had arisen; it alleges in effect that the action is brought in respect of matter cognizable by the bishop alone.

COLERIDGE J.—Our decision in this case will not trench on the general doctrine as to pleas to the jurisdiction. Suppose the statute had referred all disputes to an arbitrator,—could that have been pleaded to the jurisdiction? The bishop is to be considered in the light of an arbitrator appointed by the statute.

Manning applied for leave to amend.

Refused.

Judgment for defendant.

Monday,
April 24th.

IN re GOMPERTZ.

The marshal cannot, of his own authority, grant the rules to a prisoner in custody for contempt in not putting in an answer. If such a person be desirous of indulgence on account of ill health or otherwise, he must make a special application to the Court.

IN Trinity term, 1836, a rule nisi had been obtained calling upon *Henry Gompertz* and the Marshal of the Marshalsea, to shew cause why the said *Henry Gompertz* should not be deprived of the Rules of the King's Bench prison, and confined within the walls thereof. The application was supported by an affidavit, which stated, that *Henry Gompertz* being in the custody of the Marshal of the King's Bench, in execution, and upon detainers at the suit of various persons, was also detained upon six several attachments issued out of the equity side of the Court of Exchequer, at the instance

of *G. J. Best*, five of such attachments being for contempt of Court, in non-payment of several sums of costs: and the other being for a contempt in not putting in his answer to a bill of the said *G. J. Best*, filed in that Court: that pursuant to an order of that Court, the said *Henry Gompertz* was, on the 3rd of June last, brought up on a writ of *habeas corpus cum causis*, from the custody of the marshal into the Court of Exchequer, and committed to the custody of the Warden of the Fleet. That by another writ of *habeas corpus*, in a cause between *J. Wilson* and *C. F. Collins*, executors, plaintiffs, and the said *Henry Gompertz*, defendant, the said *Henry Gompertz* was, on the 6th of June, again committed to the custody of the marshal, charged with the further debt therein mentioned, and also with the aforesaid contempts and causes. The affidavit also alleged, that *Henry Gompertz* was living within the rules in expensive style, and that the marshal, on being requested to remove him within the walls, had stated, that *Henry Gompertz* had paid a large sum of money for the benefit of the rules. There were affidavits in reply, negating the charges of expensive living, and stating that the health of *Henry Gompertz* required the benefit of the rules; but admitting that he had given security to the marshal to a large amount. In these affidavits, two instances were set forth of prisoners charged with contempt of the Court of Chancery, for not appearing and not answering, who had been allowed the benefit of the rules. The rule had been enlarged to Michaelmas term, and subsequently to Hilary and Easter terms, 1837; and the affidavits in answer were filed, at different times, down to January, 1837.

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Platt now shewed cause for *Gompertz*. The jurisdiction of a Court over a prisoner arises out of the proceedings in the causes for which he is in custody. Here the contempts alleged are in the Court of Exchequer. The indulgence granted by the Marshal of the King's Bench, was on the imprisonment of the party in another cause. There could,

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therefore, be no dereliction of duty on the part of the marshal, in granting the rules to a prisoner in execution for an ordinary debt. But it cannot be laid down as a universal proposition, that defendants charged with a contempt cannot be allowed the benefit of the rules. That is asserted on the authority of the case of *Landen Jones* (a). But the case of *Hall v. Arnold* (b) shews, that where the marshal has thus indulged a prisoner in custody for contempt, on the score of his health, he is not punishable for misconduct. The affidavits shew, that in practice prisoners charged with contempt have occasionally been so indulged. [*Watson* objected to the affidavits not filed before Michaelmas term, 1836, being read. *Littledale J.* Undoubtedly they may be read, the rule having been enlarged from term to term].

Knowles for the marshal. By a rule, 28 Car. 2, A. D. 1676, it is ordered, "that the Marshal of the Marshalsea of this Court for the time being, do not permit any person whatever remaining in his custody on any action, or in execution, or for any contempt whatsoever, detained within the said prison, or within the liberty of the rules of the said prison, to go out of the said prison, or the liberty aforesaid, without a special rule of this Court in that behalf first had and obtained, upon the peril that may ensue." There has been no rule since upon the subject. It recognizes the marshal's right to permit a prisoner detained for contempt, to go out of the prison or the liberty of the rules, upon a special rule of Court for that purpose having been obtained. And if the marshal's power in that respect be narrowed, by acceding to such an application as the present, his fees may be materially interfered with.

W. H. Watson in support of the rule. This application in no way contravenes the rule of Court of 28 Car. 2. On the contrary, it is obtained for the purpose of enforcing

(a) 2 Stra. 617.

(b) 2 D. & R. 709.

that rule, which the marshal ought to have acted on, and which prohibits him from permitting any person remaining in his custody, *within the said prison*, to go out of *the said prison*, without a special rule of Court. Now, in this case *Gompertz* was remaining in the marshal's custody *for a contempt*, and a person imprisoned for a contempt is not entitled to the rules; the marshal ought, therefore, to have detained him in custody "*within the prison*," and had no right to permit him "*to go out of the prison*," without a special rule of Court. The authorities clearly establish that a person in custody for a contempt, especially such a contempt as that incurred by not putting in an answer, and which cannot be measured by money, is not entitled to the rules. This is the rule laid down in *Tidd*, 9th ed. p. 373, and the reason for it is obvious, viz. that such a person is confined in order to his punishment, and is in a sort of criminal custody—not for the purpose of enforcing payment. In the case of *Landen Jones* (a), the prisoner was in custody *for a contempt*, and moved to have the benefit of the rules, which was denied him, and his case is there classed with that of Captain *Hayes*, who was in prison for a forgery. *Hall v. Arnold* (b) is no authority against this motion, but, on the contrary, in its favour; that was an attempt to make the marshal liable for an escape, by motion, the proper course being by action. And it was there admitted, both at the bar and by the Court, that the general rule is, that persons in custody for a contempt are not entitled to the rules. In *re Bryant*, [a decision furnished by the officers of the Court] a rule to deprive a prisoner in custody for contempt of the benefit of the rules, was made absolute on the ground that he was not entitled to them. The rule in Courts of equity is, that a prisoner in contempt, for not putting in an answer, is not entitled to the rules. That appears, from the Registrar's Book, to have been decided in *Gordon v. Brines*, A. D. 1741; and the like point is to be

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(a) 2 Str. 817.

(b) 2 D. & R. 709.

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found in *Barnardiston* (a). But, secondly, the prisoner has, in the present case, abused the rules, so that, at all events, he ought to be deprived of them. He alleges illness as an excuse, but none of the medical men who make affidavits were his regular attendants. The marshal does not assign illness as a reason for granting him the rules, but because he gave security for 20,000*l*. He is sworn to have gone to the races for amusement, during the time of his supposed illness. Besides, if he was ill, the marshal should not have granted him the rules upon his own authority. He should have made a special application to the Court; that is the course prescribed by the rule of 28 *Car.* 2, and which was adopted in *Rex v. Bennett* (b). That is the only convenient course, for the marshal has no power of admitting an oath, or of calling the parties interested before him. This must be the province of the Court.

*Elderton* stated the practice in the Court of Chancery upon this subject to be, that where the contempt is one which can be measured by money, the custody is strait; *contra* where it is one which cannot be so measured, as, for not putting in an answer.

LORD DENMAN C. J.—It is a principle which it is important not to infringe, that the indulgence which the law affords to prisoners in custody on civil charges, cannot be extended to criminals. The question in this case is simply,—whether this prisoner be a criminal? and I think that the misconduct for which he is in custody, is of a description which we must look upon as criminal. If he seek for a relaxation of his imprisonment, on the ground of ill health or otherwise, a special application may be made to the Court; but I think the marshal cannot be allowed to act upon his own authority.

(a) *Ex parte* —, *Barnardist. Ch. Rep.* 374. (b) 4 D. & R. 832.

LITTLEDALE J.—I am of the same opinion. The distinction is between persons in custody for non-payment of money and for contempt. To the former the rules may be granted, to the latter they cannot.

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PATTESON J.—The single point is, whether the marshal is, of his own authority, to grant the rules to a prisoner in custody for a contempt, or whether there must be a special application to the Court for that purpose; I think the latter. The case of *Hall v. Arnold* (a) has been satisfactorily explained; the question there was, whether the marshal could be made liable for an escape by motion.

COLERIDGE J.—The question is a short one. It is, whether the power of granting a relaxation of the prisoner's custody is to be exercised by the marshal or by the Court. The question may be answered by considering the object of the custody, which is for punishment, and therefore not to be relaxed, unless for reasons satisfactory to the authority by which it is inflicted.

Rule absolute.

(a) 2 D. & R. 709.

KIERAN v. SANDARS.

Friday,  
April 21st.

**TROVER** for wheat. Pleas: 1, not guilty; 2, that the plaintiff was not lawfully possessed, in manner and form, then in the warehouse of *B. and W.*, agents for defendant. By defendant's direction *B. and W.* transferred the wheat, in their books, to the name of plaintiff. The wheat remained in their possession. Subsequently to the transfer, defendant received notice from one *J. M.* that the purchase of the wheat was on the joint account of himself and plaintiff, and requiring him not to deliver it to plaintiff. *J. M.* afterwards became a bankrupt, and his property vested in assignees, who gave similar notice to defendant. In consequence of these notices defendant directed *B. and W.* not to deliver it; and *B. and W.* refused samples when applied to by plaintiff. To trover for the wheat, defendant pleaded that *L. M.* and *T. H.*, the assignees of *J. M.*, were jointly interested with plaintiff in the wheat, and that the supposed conversion took place by their leave and licence. Replication: that *L. M.* and *T. H.* were not jointly interested.

Held, that the property in the wheat passed to the plaintiff by the transfer in the books of *B. and W.*, and that it was not competent to the defendant to give evidence that other parties were jointly interested with him.

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&c.; 3, that at the time when &c. *Luke Marsden* and *Thomas Holyland*, assignees of the estate and effects of *John Marsden*, a bankrupt, were with the plaintiff jointly interested in, and owners of, the said goods and chattels, as tenants in common, and that the defendant committed the alleged conversion by leave and licence of the said *L. M.* and *T. H.*; 4, that the defendant, with his partners, *Samuel Sandars* and *Edward Sandars*, detained the said goods and chattels as a lien for warehouse rent due to them from the plaintiff, to the amount of 45*l.* Replication to the third plea, that the said *L. M.* and *T. H.* were not with the plaintiff jointly interested, and owners &c., in manner and form as in the plea alleged; to the fourth plea, *de injuriâ*.

At the trial, at the Liverpool spring assizes, 1837, before *Patteson J.*, it appeared that the defendant is a partner in the firm of *S. Sandars & Sons*, corn merchants and factors, at Manchester. On the 19th, 20th and 22d February, 1836, *Sandars & Sons* sold to the plaintiff three lots of wheat, which, on the 22d, were reduced into one contract, in the following form, signed by the plaintiff.

" Mr. *William Kieran*,

Bought of *Samuel Sandars & Sons*,

| 1836.    |                                                              |   |   | £                      | s. | d. |
|----------|--------------------------------------------------------------|---|---|------------------------|----|----|
| Feb. 19. | To 1631 $\frac{1}{2}$ bus. whent, at 6 <i>s.</i> 6 <i>d.</i> | . | . | 530                    | 5  | 0  |
| — 20.    | 2350 . . . 6 <i>s.</i> 9 <i>d.</i>                           | . | . | 793                    | 2  | 6  |
| — 22.    | 2120 . . . 6 <i>s.</i> 9 <i>d.</i>                           | . | . | 715                    | 10 | 0  |
|          |                                                              |   |   | <hr/> £2038 17 6 <hr/> |    |    |

Delivered in Liverpool.

The first and third lot are at a rent of 21*s.* per week.

The second . . . . . 10*s.*

" It is understood they are all taken at the weights they have been weighed over to within the last ten days, or thereabouts; the payment to be cash, or approved bills, with the customary discount, one month from this.

*Wm. Kieran.*

" Mr. *Sandars* undertaking that they have been weighed off, and to effect insurance from this date, which he will pay Mr. *Sandars* for.

*Wm. Kieran.*"

The action was brought to recover the second lot. The plaintiff proved that the wheat was in the warehouse of

Messrs. *Booth and Walmesley*, agents of *Sandars & Co.*, that notice of the sale was given to *Booth and Walmesley*; that in March, 1836, the wheat was transferred to the name of the plaintiff by *B. and W.*, in their books, the invoice and account being rendered by *Sandars & Co.*; that it remained in possession of *Booth and Walmesley*; that payment was made by instalments, and the accounts between plaintiff and *Sandars & Co.* made up to the 7th July, 1836; that plaintiff's agent applied for samples in Nov. 1836, to *B. and W.*, and was refused, in consequence of directions from *Sandars & Co.* The counsel for the defendant submitted that the plaintiff ought to be nonsuited; the defendant having parted with the property by the transfer in the books of *B. and W.* the warehousekeepers, the refusal of the samples (which was the alleged conversion) was the act of *B. and W.* The learned judge held, that the property passed by the transfer, but that the possession remained in the warehousekeepers, as agents for the defendant, and that their refusal was an act of the defendant. The counsel for the defendant then proposed to prove, in support of the third plea, that in October, 1836, *Sandars & Co.* had received a notice from *John Marsden*, that the lot of wheat in question was on the joint account of himself and the plaintiff, and that they were to hold the wheat on his account until further orders. That *John Marsden* afterwards became bankrupt, that they received notice from the provisional assignee not to deliver the wheat, and that *L. M.* and *T. H.* were appointed assignees of *J. M.* The learned judge held that the defendants could not give evidence to set up a title in the assignees. Verdict for the plaintiff, with leave for the defendant to move to enter a nonsuit, or for a new trial, on the ground of the improper rejection of evidence.

*Alexander* now moved for a rule to shew cause. By the form of pleading in this case, a direct issue is tendered by the plaintiff and accepted by the defendant, on the question whether the property was the plaintiff's, or whether others

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were jointly interested with him in it. It was therefore competent to the defendant to prove that joint interest. [*Patteson J.* I thought that the defendant, having contracted with the plaintiff, having been paid by him, and having procured the transfer of the property in the warehouse-keeper's books into the plaintiff's name, could not now set up an interest in other parties. The form of pleading makes no difference. If such evidence could not have been given formerly, under the plea of not guilty, the defendant cannot now raise the issue by his pleading.] Then the plaintiff should have pleaded in his replication, that the defendant was estopped from denying his title. [*Patteson J.* In use and occupation an estoppel cannot be pleaded, nor can it here. It is matter of evidence (a).] The plaintiff here himself tenders the issue by his replication, and therefore raises the point. *Wilson v. Hart* (b) shews that it is competent for a vendee to explain by parol evidence, a written contract for the sale of goods, by shewing that he bought only as agent for another. The plaintiff might, in this case, have replied in such manner as to shew that the defendant could not set up this plea by stating the previous course of dealing between them; instead of which, he merely denies the joint ownership.

Lord DENMAN C. J.—The transfer was complete by the custom of the trade. The defendant, having sold wheat to the plaintiff, and delivered it to him by this transfer, cannot transfer it to another party, on representations by that party that he is a joint owner.

COLERIDGE J.—The evidence adduced by the plaintiff was conclusive as to an actual transfer to him by the defend-

(a) Estoppels are of three sorts:—1. of record; 2. in writing, (*i. e.* by deed, as explained by *Coke*;) and 3. *in pais*; and as use and occupation proceeds on the tenancy being created by parol, the estop-

pel to be set up of course must be *in pais*. See Co. Litt. 352 a; 1 Wms. Saund. 325 a, notes (4) and (c).

(b) 1 B. Moore, 45; S. C. 7 Taunt. 295.

ant, the defendant is therefore become a stranger to the property, and cannot prove the joint ownership of another party.

PATTERSON J. concurred.

Rule refused.

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TAYLOR and another, Assignees, v. WILKINSON and another.

Saturday,  
April 22d.

THE facts of this case are reported in 5 Nev. & M. 189. The first action was brought by original in 1812, by *Taylor and another* against *Gregory*. After the present defendants had become bail for *Gregory*, the declaration was amended by the addition of two new counts. A verdict was entered for the plaintiff, with damages, partly on the old and partly on the new counts, and judgment entered thereupon for 2104*l.* 17*s.* 6*d.*, and also for the costs of increase. On scire facias against the bail for non-payment of the two sums of 1*s.* and 1001*l.* 11*s.* 2*d.*, recovered on the counts originally in the writ and declaration, judgment was given on demurrer for the plaintiffs, in Trinity term, 1835. The master taxed the costs on the original and added causes of action together, in the cause of *Taylor and another v. Gregory*, and also taxed the costs in *Taylor and another v. Wilkinson and another*, at the sum of 212*l.*, and judgment was signed for 1000*l.*, (being the sum at which *Gregory* was held to bail,) and also for the costs in both actions. In this term the defendants obtained a rule nisi, calling on the plaintiffs to shew cause why they should not be restrained from issuing execution against the defendants for a larger sum than 1000*l.*, being the amount at which *Gregory* was held to bail, in the action *Taylor and another v. Gregory*, and the sum of 212*l.*, being the amount at which the costs in the action, *Taylor and another v. Wilkinson and another*, had been taxed.

Where, after bail has been put in to an action, the declaration is amended by the addition of new counts, containing fresh causes of action, and the plaintiff recovers both on the original and added counts, the bail are not liable to the costs on the latter. And it lies on the plaintiff to have the costs separated in taxation; as, if they are taxed generally, he cannot recover them against the bail.

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Sir *W. W. Follett* now shewed cause. If a plaintiff puts into his declaration causes of action distinct from that for which the bail became security, and recovers on those causes, the bail are not liable; but if he recovers both on the original and added causes, the bail are liable as far as regards the original causes; *Wheelwright v. Jutting* (a). But if the plaintiff recovers on the original causes, he is entitled to the general costs, at all events, where they have not been taxed separately as applicable to the different counts, and the bail have made no application to get that part of the costs relating to the added counts disallowed.

Sir *J. Campbell A. G.*, in support of the rule. When the plaintiffs recovered in the original action, the damages were assessed separately, part belonging to the original, and part to the added counts. The plaintiffs have now assessed their costs on that action generally, without distinguishing between those applicable to the count on which the defendants are liable, and those on which they are not. It was their business to have procured that distinction to be made; the defendants are not liable for the general costs. [*Patteson J.* In order to make the bail liable, there must be a division: who can make it? the bail cannot go before the Master.] The bail do not contend that they might not be liable for their share of the costs, only that it did not lie on them to effect the separation.

The COURT (b).—The only question is, whether it lay with the bail to make the application for a distinction between the costs on the original and added counts. They ought not to be liable beyond the costs incurred in those causes of action for which they became security, and the onus of separating the liability lay on the plaintiffs.

Rule absolute.

(a) 7 Taunt. 304.

(b) Lord Denman C. J., Littleton, Patteson, and Coleridge, Js.

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The KING v. GREENE and others.

Saturday,  
April 22nd.

A Rule had been obtained by *Blackburn*, in Trinity term, 1836, calling on *Joshua Greene*, *Jabez Hood* and *William Kenmir*, late stewards, and *Joseph Willis*, late town-clerk of the borough of Gateshead, in the county of Durham, to shew cause why a mandamus should not issue, commanding them to deliver up and account to the council of the mayor, aldermen and burgesses of the said borough, for all the monies, goods, valuable securities, books, and papers, belonging to or concerning the borough holders and freemen of the said borough, which were, on or after the 5th day of June, 1835, or at the time of granting the said rule or order, in their possession, receipt, custody or power.

It appeared by the affidavits in this case, that the town of Gateshead is among the places named in the first part of Schedule A. of the Municipal Reform Act; but that it has only acquired the title of "borough" in the same manner as the town of Sunderland, namely, by common reputation. No charters of incorporation have ever been granted to it: the only corporations which have ever existed within it were such as have been constituted by the grants of different bishops of Durham for purposes of exclusive trading. The persons styled the "borough-holders and freemen" of Gateshead never were incorporated at all, and never exercised any municipal powers. The borough-holders were the owners in fee simple of certain freehold burgages or ancient tenements, admitted at courts held by the steward of the lord of the manor of Gateshead. The Bishop of Durham is lord paramount; but the manor is now on lease. The freemen of Gateshead are at present reduced to the number of four, and are the remnant of several companies, to which charters of incorporation were formerly granted by bishops of Durham. The then stewards admitted being in possession of books and papers, and in the receipt of rents derived from property belonging to the borough-holders and freemen.

The insertion of the name of a town in Schedule A. of the Municipal Corporation Reform Act, is *prima facie* evidence of the existence of a municipal corporation there: but if facts be adduced on affidavit to negative that presumption, a mandamus will not issue to compel the delivery of books, papers, monies, &c. by the ancient officers of the town, to the council elected under the new act.



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The first election of councillors under the Municipal Reform Act took place in January, 1836; and the officers of the new corporation instituted the present proceedings for the recovery of the property and documents.

Sir *J. Campbell* A. G. (with whom were *Ingham* and *A. J. Stephens*,) now shewed cause against the rule, and contended, on the facts disclosed in these affidavits, that Gateshead had been inserted in the Municipal Reform Act by mistake, and that the property of which it was sought to enforce the surrender was strictly private property.

The Court called on

*Talfourd* Serjt., with whom was *Wightman*, *contra*. There is evidence of the existence of a body of borough-holders and freemen from very ancient times. There does not appear any mode of acquiring the freedom except by succession. These facts, coupled with the mention of the borough in Schedule A. of the Municipal Reform Act, will raise a presumption of the existence of a municipal corporation there, which the Court will not decide against on affidavits. The stewards received the copy of the Municipal Reform Act, which was sent them from the post-office; and they, with the returning officer of the borough, appointed a person to execute the duties of town-clerk. No proceedings have ever taken place against the persons elected under the new act. There is a common seal, which is part of the property we claim.

LORD DENMAN C. J.—The mention of Gateshead in the Municipal Reform Act furnishes *prima facie* evidence of the existence of a municipal corporation there; but that evidence is rebutted by facts stated on affidavit; and these facts are uncontradicted. We cannot grant the mandamus.

LITLEDALE, PATTESON, and COLERIDGE, Js., concurred,

Rule discharged (a).

(a) See *Rex v. White*, *ante*, 84.

STANNARD v. FORBES and another, Executors of JOHN LOCK.

**COVENANT.** The declaration set out an indenture, made &c. February 26, 1825, between *George Scott*, as guardian of *Georgiana Scott*, of the first part; *Seahnah Stoe Clements*, of the second part; and *John Lock*, of the third part; by which *George Scott* demised one undivided moiety, and *S. S. Clements* demised the other undivided moiety of a messuage to *John Lock*, to hold the first moiety for eleven years, if *Georgiana Scott* should so long live, and the other moiety for the same term, if *S. S. Clements* should so long live. The declaration then stated the entry by *John Lock*, and an indenture of assignment by *John Lock*, executed 21st September, 1820, to the plaintiff, which, after reciting that the said *George Scott* and *S. S. Clements* had demised the premises in the above indenture described, *to the said John Lock, his executors or assigns, for the term of eleven years from the 25th December then last past*, and also reciting that *Lock* had agreed to sell to the plaintiff the messuage demised by the said indenture of lease, *for the residue of the said term of eleven years*, proceeded thus: And the said *John Lock* did then and there grant, bargain, sell, assign, transfer and deliver unto the plaintiff, his executors &c., the said messuage &c., to have and to hold from the 29th September then next ensuing the date thereof, for and during all the rest, residue and remainder, which should be then to come and unexpired of the said term of eleven years therein expressed. Covenant by *John Lock*, his executors &c., that notwithstanding any act, deed, matter or thing done by him at any time theretofore, the before-recited lease (of 1825) was at the time of

standing any such act, he the said *J. L.* had full power to assign, &c.: Before the assignment *C.* had died, and *J. L.* knew the fact:—Held, that the covenant of the lease being valid and not determined, was qualified by the preceding covenant, and restrained to any acts done by *J. L.*, and that therefore he was not liable upon this covenant for an eviction by the party entitled on *C.*'s death.

2. After the death of *C.*, *J. L.* paid rent to the party entitled on *C.*'s death: Held, that this did not amount to an act done by *J. L.* so as to forfeit the lease, by converting the term into a tenancy from year to year, because the lease had already expired by *C.*'s death.

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1. *J. L.*, who was possessed of a term for years, provided *C.* should so long live, assigned the term, and covenanted, that notwithstanding any act, deed, matter or thing done by him at any time theretofore, the lease was at the time of the assignment a good, valid, and effectual lease, and that the same, and the term of eleven years therein expressed, was in full force and effect, and in nowise forfeited, surrendered, assigned, determined, or otherwise become void or voidable, or prejudicially affected in any manner howsoever, otherwise than by effluxion of time; and also that for and notwith-

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these presents a good, valid, and effectual lease, *and that the same, and the term of eleven years therein expressed, was in full effect, and in nowise forfeited, surrendered, assigned, determined, or otherwise become void or voidable, or prejudicially affected in any manner howsoever otherwise than by effluxion of time.* And also, that for and notwithstanding any such act, deed, matter or thing, he the said *John Lock* had full power to assign : and further, that the plaintiff should quietly enjoy &c., without any action, suit, eviction, &c., whatsoever, of or by the said *John Lock*, his executors &c., or any persons rightfully claiming or possessing any estate, right, title, charge or interest, into or out of or upon the said premises, or any part thereof, by, from, or in trust for him or them, or by or through his or their acts, deeds, defaults, means, consent or privity ; and from and against all former and other assignments and incumbrances, &c., which should or might be committed, created, or knowingly suffered by *Lock*, or any person claiming through his covenant for further assurance. The declaration then stated an assignment by the plaintiff, dated 19th January, 1829, to one *James*, of the premises for the residue of the term above granted, provided *Georgiana Scott* and *S. S. Clements* should so long live. This assignment contained absolute covenants by the plaintiff to *James* that the lease to *Lock* was a good and subsisting lease, and not surrendered or become void or voidable ; that *James* had power to assign ; and also a covenant for quiet enjoyment by the said *James*, provided *Georgiana Scott* and *S. S. Clements* should so long live. The declaration then averred, that before the assignment by *Lock* to the plaintiff, *S. S. Clements* died, by which the lease of 1825, as to one moiety, became voidable and was void, and that thereupon *George Scott* became entitled ; and it then stated an eviction by *George Scott* of *James*, by process of law in 1831, an action of covenant by *James* against the plaintiff, and payment by plaintiff to *James* of 1154*l.* in respect thereof. It also averred, that before the making the indenture between *Lock* and the plaintiff, *Lock* had notice of

the decease of *S. S. Clements*, but that the plaintiff had no notice of it at the time of the indenture between the plaintiff and *James*. Breach assigned, that by reason of the death of *S. S. Clements*, at the time of making the indenture between *Lock* and the plaintiff, the said lease was not a good, valid, and effectual lease (in the terms of the covenant).

The defendants pleaded—1. *Non est factum*; 2. that *George Scott* did not eject *James*; 3. that at the time of making the indenture between *Lock* and the plaintiff, *Lock* had not notice of the death of *S. S. Clements*; 4. that plaintiff had been kept harmless from all assignments, estates &c., created by *Lock*, or any person claiming from or under him.

*Seahnah Stoe Clements* died on the 7th September, 1825, and the jury found that *Lock* had notice of her death before September, 1826, when he assigned the remainder of the term to the plaintiff. The plaintiff entered into and was possessed of the premises under the assignment of the 21st September, 1826, and afterwards assigned to one *R. James*, who was by due course of law evicted, in Hilary term, 1831, of one moiety of and in the demised premises, by one *George Scott*, having a title arising upon the death of the said *S. S. Clements*. It was proved at the trial that the said *George Scott* received from *Lock*, in April, 1836, 50*l.* for one year's rent, due to one *Hardisty*, (the guardian of *Joseph Clement*, on whom *S. S. Clements*' moiety had devolved,) and himself, and afterwards received the rent of *James* and *Stannard*, up to his eviction of both moieties, as reserved by the lease of February, 1825. Assets were admitted by the defendants.

The cause came on for trial at the Middlesex sittings in Michaelmas term, 1834, when a verdict was taken for the plaintiff, subject to the opinion of the Court on the plaintiff's right to recover damages against the defendants for breach of covenant entered into by *Lock*. It was agreed that the amount of damage, in case the plaintiff should be ultimately held entitled to recover, should be referred to a gentleman

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of the bar. The question for the Court is, whether the plaintiff is entitled to recover in this action against the executors of *Lock* for breach of covenant.

This case was argued in Hilary term (a).

*Kelly* for the plaintiff. It may be admitted, that some of the covenants in the assignment from *Lock* to the plaintiff, are qualified, but the covenant that the lease from *Scott* and *Clements* was a good and subsisting lease, and not determinable except by efflux of time, was absolute. The second plea states, that *George Scott* did not eject the plaintiff's assignee; it is, however, admitted that he did so. The third plea traverses that *Lock* had any notice of *S. S. Clements'* death, but the jury have found that fact distinctly. The fourth plea alleges that the plaintiff had been kept harmless from all assignments and interests created by *Lock*, or any one claiming under him. But, supposing this plea to be true, it is no answer to the breach of covenant that the lease, at the time of the assignment to the plaintiff, was a valid and subsisting lease, which is the main issue on the record. Therefore, if the defendants have a verdict on the fourth issue, the motion may be made in arrest of judgment.

1. It is submitted that *Lock*, by the recital in the indenture of assignment that this was a good and valid lease for the residue of the term of eleven years, and by the implied covenants contained in the terms "grant and assign," intended to covenant that this was a good and valid lease, not determinable on the death of any party, and not void at the time.
2. Independently of the implied covenant, the absolute covenant of its being a good and valid lease is not qualified by any of the qualified covenants in other parts of the deed.
3. Supposing the Court to think no one covenant is unqualified, but that they are to be taken altogether, still the breach is proved of those covenants in which *Lock* has covenanted against any acts done, suffered, or permitted by him, inasmuch as he knew, at the time of making the

(a) Jan. 24, *cor.* Lord Denman C. J., Williams and Coleridge Js.

assignment, that he was reciting falsely, and that the lease was determined; his conduct, therefore, amounts to an act done. 4. Inasmuch as *Lock* had, subsequently to the grant of the original lease, accepted a tenancy from year to year, by paying rent to the reversioner, he thereby did an act by which a surrender is created of the term of eleven years, which he had covenanted should subsist notwithstanding any act done by him.

Assuming that the covenant, as to the validity of the lease, is a qualified one, it is a covenant that, notwithstanding any act done by *Lock*, the lease was in nowise forfeited or surrendered. But in a case from the Norfolk circuit it seems to have been held, that an agreement to hold strictly as tenant at will, would operate as a surrender of a previous lease. [*Coleridge J.* Would the agreement to pay rent to a third party operate as a surrender of a lease from a different person?] Perhaps not, if the lease were an absolute lease, but here the lease was determined on the death of *S. S. Clements*. The facts of the case shew that an act has been done by *Lock* prejudicing the title to the lease. In *Howes v. Brushfield* (a), a covenant for quiet enjoyment against any interruption from the vendor, or by or through his acts, means, default, &c., was adjudged to extend to an arrear of quit rent due at the time of the conveyance, although it was not shewn that the rent accrued due during the time the vendor held the estate. Sir *Edward Sugden* says (b), we should be careful to distinguish this case from that (c) where the lessor, reciting that he was seised of an estate of freehold and inheritance in the lands, covenanted for quiet enjoyment against himself, his heirs &c., or any other person lawfully claiming by, from, or under him, &c., or by or through his acts, means, default, or procurement. The lessees there were evicted by the remainder-man under a settlement, and it appeared that the lessor could have obtained the fee simple by suffering a recovery. Lord *Rosslyn* considered that the lessor was liable

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First point.

(a) 3 East, 491.

(b) 2 Vend. & Purch. 88, 9th ed.

(c) *Lady Cavan v. Pulteney*, 2 Ves. jun. 544.

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on his covenant; and Sir *E. Sugden* states, that the ground of this opinion must have been, that the eviction was owing to the default of the lessor in not suffering a recovery. He assumed to be tenant in fee, and the nature of his title rested in his own breast; whether the default arose from fraud or negligence, was to the lessees immaterial.

The principle of *Lady Cavan v. Pulteney* (a) applies strongly here. The lessor there covenanted only against his own acts, but he recited that he was seised in fee, and was held liable on the covenant for quiet enjoyment. Here, *Lock* recites that the term is valid for the residue of eleven years. It was formerly thought that the rule by which leases having qualified and unqualified covenants were to be explained was, that if a qualified clause was to be found at the commencement or at the end of covenants, then all the covenants were to be qualified, but not so if it was to be found in the middle of a sentence. The rule, however, now is, that all the covenants are to be taken together, and the intention of the parties to be gathered from them; *Gainsford v. Griffith*, and notes (b). Can it be contended that it was the intention of the parties to this assignment, that the plaintiff should only take a tenancy from year to year, which is all the interest that *Lock* then had in one moiety? If it had appeared that this defect in the title had existed unknown to *Lock*, there might be something in the argument of intention, but *Lock* knew that the lease was determined otherwise than by efflux of time, at the moment of assigning it.

Second point.

As to the implied covenant on the words "dedi, concessi," the rule is, if there is an express covenant which adds to an implied qualified covenant, there is an end to the implied covenant; but where the express covenant is only cumulative, the implied covenant is still in force; *Co. Litt.* 384 a. The only argument by which the force of the covenant on the words "grant, assign," can be restrained is, that the subsequent covenants limiting to acts done by *Lock*, qualify the implied covenant also. But *Johnson v.*

(a) 2 Ves. jun. 544.

(b) 1 Wms. Saund. 60, a. n. (1.)

*Procter* (a) is an express authority on this point. There a lease was granted by the Archbishop of York to *Johnson* and *Vavisor*. *Vavisor* assigned all his interest to *C.*, and died. *Johnson* afterwards, by indenture reciting the lease, and that it came to him by survivorship, granted the residue of the term to *Procter*, and covenanted for quiet enjoyment, notwithstanding any act done by him. *Procter*, being evicted by the assignee of *Vavisor*, sued *Johnson* on his covenant and recovered against him, and the distinction was taken, that the qualified covenant should not restrain the general one, as in *Noke's* case (b), because in this case the grant was never good; for, as to the moiety, *Johnson* had no power to grant at all. It is therefore exactly the present case. In *Browning v. Wright* (c), Lord Eldon C.J., in discussing *Johnson v. Procter*, pointed out that the recital in that case amounted to a warranty. Here also *Lock* recites that he has a certain estate, which was false within his own knowledge. [*Coleridge J. Johnson v. Procter* is reported also in 1 *Bulstr.* 2, and 2 *Brownl.* 212, and I apprehend it was reversed in error (d).] *Barton v. Fitzgerald* (e) is also a very similar case to the present, and there the doctrine of the intention of the parties in the construction of covenants was fully considered. The defendant there only covenanted to assign to the plaintiff in as full a manner as he enjoyed the same, but as he assigned over the residue of a term absolutely, and covenanted that it was a good and subsisting lease, and it appeared that the original lease was like the present, determinable on a life in being, it was held, that a breach might be assigned on the absolute covenant for title. *Smith v. Compton* (f) is a recent authority to shew that a covenant absolute in its terms, is not to be qualified by subsequent or preceding

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(a) Yelv. 175; S. C. Cro. Jac. 233; Cro. Eliz. 809; 1 *Bulstr.* 2; 2 *Brownl.* 212.

(b) 4 Rep. 80 b.

(c) 2 B. & P. 13.

(d) The case came up to the K. B. on error from the C. P., and

after remaining in the former Court for seven years, (see 2 *Brownl.* 212,) the judgment of the C. P. was affirmed.

(e) 15 East, 530.

(f) 3 B. & Ad. 189.



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covenants, and *Milner v. Horton* (a) was overruled; *Howell v. Richards* (b) is to the same effect. Another point is deducible from *Browning v. Wright* (c). That was a question on the conveyance of an estate in fee; this is on a leasehold, and Lord Eldon said, *primâ facie* "in the conveyance of an estate of inheritance, we are led to expect no other covenants than those which guard against the acts of the vendor and his heirs. With respect to the conveyance of leasehold estates, this is not always so, and there is an obvious reason why it should not be so." His lordship goes on to shew, that in conveying a fee the purchaser sees the whole title, and accepts or not, as he chooses; but in leasehold estates, as the title is often not to be got at, an absolute covenant is frequently required that the vendor holds a valid and indefeasible lease.

*Hoggins* (and *Tremenheere* was with him), contra. The real question is, whether *B.*'s covenants are qualified covenants. The rules upon the subject are laid down by Sir *Edw. Sugden* in his *Treatise on Vendors and Purchasers* (d). Thus it is laid down, that where restrictive words are inserted in the first of several covenants, having the same object, they will be construed as extended to all the covenants, although they are distinct; and, in support of this position, *Browning v. Wright* (c) is cited. In that case a vendor covenanted, that, notwithstanding any thing by him done to the contrary, he was seised in fee, and that he had good right to convey in manner aforesaid. It was held, that the generality of the latter covenant was limited by the restrictive words in the former. In the present case *Lock* covenants, that, notwithstanding any act done by him, the lease is valid, and the term in nowise forfeited; and that, notwithstanding such act, he had the full power to assign; and further, that the plaintiff shall quietly enjoy, and that free from any incumbrances committed by him. All the covenants, therefore, are qualified. *Gainsford v. Griffith* (e)

(a) M'Clel. 647.

(b) 11 East, 633.

(c) 2 B. & P. 13.

(d) 2 V. & P. 81, et seq. 9th ed.

(e) 1 Wms. Saund. 58.

was cited, but that is distinguishable, because there the *first* covenant was general. In the present case the limited covenant comes first. A general recital is controlled by a particular covenant. Here there is no warranty, the recital merely refers to the lease, *Lock* has only covenanted for his own acts, and there is nothing in the recital, or in any other part of the deed, which shews that he intended to covenant absolutely. Then it is said, that assuming that covenant (that of the lease being valid) to be qualified, there has been a breach of that covenant, inasmuch as *Lock* knew at the time of making the assignment that the lease was invalid, and for this *Howes v. Brushfield* (a) has been cited. Sir *Edward Sugden* doubts the authority of that case, and refers to *Hesse v. Stevenson* (b); and he cautions the reader from applying that decision to cases arising in practice, as it may lead him to draw conclusions not authorized by prior decisions. *Lady Cavan v. Pulteney* (c) is distinguishable from the present case, because there the party recited that he was seised of an estate of freehold. In *Woodhouse v. Jenkins* (d) a tenant for life and his eldest son, who was the next remainder-man in tail, demised to A., who was conusant of their title, for 99 years; the tenant for life and the remainder-man covenanted with A. for quiet enjoyment against themselves, their heirs and assigns, and all persons claiming under them; A. granted an under-lease of the estate to B., and covenanted for quiet enjoyment against himself, his heirs, executors, administrators, and assigns, or of or by any other or persons whomsoever lawfully claiming or to claim by, from, or under him, them, or any of them, or by his, their, or any of their acts, means, consent, neglect, default, privity, or procurement; the tenant for life and the tenant in tail both died, the latter without issue. It was held, that A. was not liable on this covenant for an eviction by the ultimate remainder-man, as that was by a

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(a) 3 East, 491.

(c) 2 Ves. jun. 544.

(b) 3 B. &amp; P. 565.

(d) 2 Moore & S. 599; 9 Bingh.  
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title paramount; that no act was done by him, nor could it be considered an eviction by his default. *Tindal C. J.*, in delivering the judgment of the Court, cites *Lady Cavan v. Pulteney* (a), and distinguishes that case from *Woodhouse v. Jenkins* (b). Then it is said that there is an implied covenant from the recital and the use of the word "grant," and for this *Johnson v. Procter* (c) was cited as an express authority. *Sir Edward Sugden* says, "that the ground of the decision (in *Johnson v. Procter*) appeared to be, that the word "grant," in the assignment, amounted to a warranty of the title, and was not qualified by the ensuing particular covenant, because the grant was of the whole estate, as appeared from the recital, and was defective from the first as to a moiety, and the condition of the bond was to perform all grants, &c.

"It seems material to refer the case of *Johnson v. Procter* to the true ground of the decision, because, if the case turned solely on the recital, it might, perhaps, be thought that a general recital in a conveyance of the inheritance of an estate, that the vendor is seised in fee, would amount to a general warranty, and would not be controlled by limited covenants for the title; a proposition which certainly cannot be supported." The recital here is not in such strong terms as in *Barton v. Fitzgerald* (d) and *Johnson v. Procter* (c).

*Kelly*, in reply. [*Coleridge, J.* Can we take into consideration the knowledge of the defendant, either that the lease was determinable as to a moiety, or that he had become tenant from year to year by payment of rent?] The fact is stated in the declaration, and found against the defendant; there must be a verdict for the plaintiff on three pleas. The defendant says that the introductory words qualifying his liability must apply to all the covenants which follow those words. The second covenant is, that the term is neither forfeited, surrendered, or otherwise impaired, ex-

(a) 2 Ves. jun. 554.

(c) *Ante*, 638.

(b) 2 Moore & S. 599; S. C.

(d) 15 East, 530.

9 Bing. 431.

cept by the effluxion of time; the application of the restrictive words to this covenant would render it absurd, as the expiration of the term by effluxion of time can be no act of the covenantors. If these restrictive words are to be applied to the second covenant, they must be applied to all, and if applied to the one respecting the payment of rent, they likewise make that nonsensical. It is laid down by Sir *Edward Sugden* (a), that where the covenants are of divers natures, and concern different things, restrictive words added to one shall not control the generality of the others, although they all relate to the same lands. The recitals in *Barton v. Fitzgerald*, and *Johnson v. Procter*, are the same as that in the present case.

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*Cur. adv. vult.*

LORD DENMAN C. J., on this day, after stating the facts of the case, proceeded as follows :—

It has long been established, that where, in a conveyance, express covenants for warranty are introduced, none can be implied from the general words of conveyance, and that the Court has no other duty to discharge than that of correctly construing the language employed. In performing this task on any particular occasion, we are not likely to derive much assistance from the former decisions that may be cited, as every instrument varies in some respect from all others, and must be interpreted according to its own language. It should seem that the true grammatical sense of the words employed, when that can be ascertained, must prevail, and no case can be quoted in which our Courts have thought themselves at liberty to act in direct contravention of it. Such a course might indeed become necessary, for a deed may contain repugnant clauses; where these occur, the authorities fully warrant us in comparing the clause under immediate consideration with all which precedes and follows it, even though not forming

(a) 2 V. & P. 101, 9th edit.

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parts of the same sentence, and with the nature of the obligations entered into, for the purpose of discovering and effectuating the intention really expressed by the parties. But when we examine the covenant said to have been broken by *Lock*, by conveying the term after his title had determined, and find it inseparably connected with the preceding words, we do not feel the least difficulty as to the grammatical meaning, and that appears on examination to be conformable to the general intention of the testator who entered into the covenant.

All the covenants but the second are admitted to be restricted; the second is in these terms. (His lordship here read the covenant.)

But the whole series of covenants is introduced by qualifying words, which (we cannot doubt) run through both clauses of the sentence. The effect is, "I covenant, that for and notwithstanding any act of mine, I have a right to convey the term, and that the term is neither forfeited, surrendered, nor in anywise impaired, *except by the effluxion of time.*"

It was acutely remarked, that these last words rendered the restriction nonsensical, as effluxion of time could have been no act of the covenantor. They are, indeed, unnecessary, but from that quality in legal documents, too strong inferences cannot be safely drawn. On the other hand, the absurdity of guarding himself from covenanting against any acts but his own, and in the same breath covenanting that the term was not affected by the acts of any person whatever, is glaring, and is rendered still more so by his repetition of the qualifying words after the succeeding covenant, which relates to the fact of clearing up arrears, &c., a fact with which his predecessors could have no concern.

The same words are carefully incorporated in the residue of his covenants. The covenants, in truth, form one sentence, the first clause of which is restricted by the acts of the covenantor, the second omits to repeat the restriction,

but the third refers to it by the expression "for and notwithstanding any such acts, &c."

If both parties had attentively scanned the language of the deed before completing the assignment, neither could have believed the covenant to include any others than the testator and those claiming under him.

We feel it unnecessary to travel through the cases: that of *Browning v. Wright* (a) may, however, be referred to as fully warranting the principle on which we act, and closely resembling the present case in the form of the covenant.

A second point was attempted to be raised from an additional fact in the case, viz. that, supposing the construction above stated to be right, there was still a breach of covenant by *Lock* in paying rent to his lessor after knowledge that one of the lives had fallen. This act, it was said, would have the effect of converting his term into a tenancy from year to year, if done while the life continued, and could have no less effect after the life had dropped.

But granting these premises for the sake of the argument, we think the conclusion does not follow, for the simple reason that the payment of rent made no difference whatever in *Lock's* interest, which had previously expired. What he did was wholly inoperative, and could not therefore be a breach of his covenant.

For these reasons we are opinion that the plaintiff is not entitled to recover, and our judgment must be for the defendant.

Postea to the defendant (b).

(a) 2 B. & P. 13.

(b) Upon this subject, see note L. of *Sanders's Uses and Trusts*.

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April 29th.*

**The KING v. The Commissioners of the BEVERLEY GAS WORKS.**

Commissioners were appointed under two local acts for the purpose of paving, lighting, &c. the streets of the town of B. They have power to erect or purchase gas apparatus: and, if they should erect or purchase such apparatus, they are authorized, after sufficiently lighting the streets, to let out or grant gas to private individuals, upon such terms and at such rents as they shall think proper: provided nevertheless, that all money arising therefrom be applied, in the first instance, to defray the expense of the apparatus, &c; and if there be any surplus, the

**APPEAL** against a rate for the relief of the poor of the parish of St. Martin's, Beverley. The appellants, by the name of The Proprietors of the Gas Works, were rated in the sum of 42*l.* for the gas works, and 8*l.* for certain tenements. The sessions confirmed the rate absolutely as to the tenements, and as to the gas works subject to the following case.

The commissioners are appointed by two acts, 48 *Geo.* 3, c. xxxvii., and 6 *Geo.* 4, c. cxxxviii. The ground on which the gas works in question are erected is within the parish of St. Martin's, Beverley, and was formerly garden ground, and as such rated to the relief of the poor. It was afterwards purchased by one *J. M.*, who erected the works in question upon it, and carried on the business of manufacturing gas there for his own benefit for about two years; during all which time the said *J. M.* was rated to the relief of the poor of the parish of St. Martin, as proprietor and occupier of the said gas works. The said commissioners afterwards, in the year 1828, in pursuance of powers conferred on them by 6 *Geo.* 4, c. cxxxviii. s. 4, purchased the said ground with the buildings standing thereon, being the gas works in question, from the said *J. M.*, for 8000*l.*, and are still the proprietors of them, and have since that time carried on the business of manufacturing gas there. For the purpose of completing the purchase, and for other purposes under the act in question, the commissioners borrowed the sum of 8500*l.*, and, as a security for the same, have mortgaged the rates hereinafter mentioned. In

same shall be applied generally for the purposes of the acts. The commissioners are also authorized to levy rates for the purposes of the acts.

In pursuance of these acts, the commissioners purchased gas works within the parish of M., of *J. M.*, who had been previously rated to the relief of the poor as proprietor and occupier of those gas works, and have continued to manufacture gas there, to supply the streets, and to let out gas to private consumers, applying the money thus obtained as prescribed by the act.

The commissioners are not rateable to the relief of the poor as proprietors or occupiers of the gas works.

pursuance of the last-mentioned act, and after the purchase of the said gas apparatus and premises, the commissioners have lighted the streets, &c. of Beverley with gas, without contracting for it, as they had done previously to the said purchase; and have let out private lights, &c. as authorized in the act, and at such annual rents as they have thought proper. The commissioners have applied all the money proceeding from this source to repay the expense of the gas apparatus, &c., as directed by the said act; and for answering the expense of lighting the streets, &c. and carrying into execution the purposes of the said acts, they have from time to time, under the authority of those acts, caused the necessary sums to be raised by rates on the occupiers of premises: which sums they have uniformly applied according to the directions of the acts.

The commissioners are occupiers of the said gas works and premises, but "have no beneficial occupation of, or emolument resulting from," the said gas works, "or other subject of the rate, in any personal or private respect (a)." If the Court is of opinion that the commissioners are liable to be rated to the relief of the poor for their gas works, the order to be confirmed: if otherwise, the rate to be amended by striking out so much as relates to the gas works only.

*Archbold* in support of the order of sessions. The act under which the gas commissioners are empowered to let out gas to private consumers at such rent as they may think proper, contains no provision compelling them to reduce the price in case of a surplus arising from that source; they are therefore in the situation of traders who may make a profit by the use of the commodity. If, indeed, they had


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(a) The words of Lord *Ellenborough* in *Rex v. Terrott*, 3 East, 514, "If the party rated have the use of the building, or other subject of the rate, as a mere servant of the crown, or of any public

body, or in any other respect, for the mere exercise of public duty therein, and have no beneficial occupation of, or emolument resulting from it in any personal or private respect, then he is not rateable."



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taken land and erected works at their own cost, they might have alleged that all they did was merely in order to supply the town with gas, and that they were not rateable for it: but here they take the works from a private trader who was already rated for the occupation of them. *Rex v. The Inhabitants of Liverpool* (a) will be cited on the other side; and that case would have been in point if the commissioners under the act there mentioned had been empowered, as they are in this instance, to use the property in such a manner as to have the possibility of making a profit from it. In *Rex v. Trustees of the Weaver Navigation* (b), there was also a provision in the act, confining the application of any surplus derivable from the tolls to public purposes. In *Rex v. Agar* (c) the trustees of a methodist chapel were held rateable, although they expended the whole of the rents received by them in disbursements for repairs, salaries, &c. So in *Rex v. The Trustees for the Inhabitants of Tewkesbury* (d), the trustees were rateable for the occupation of meadow land, although held by them in trust for the burgesses and principal householders of the place; *Rex v. The Mayor of Sudbury* (e). So here the commissioners are to be regarded as trustees for the burgesses; they carry on business as traders for their benefit. *Rex v. The Inhabitants of St. Giles's, York* (f), is also a case of trustees making a profit but deriving no benefit. [*Patteson J.* The principle there was, that parties rated on account of a profit cannot decline their liability by applying that profit to charitable purposes.]

*J. Hildyard*, contra, was stopped by the Court.

LORD DENMAN C.J.—This rate cannot be enforced. The commissioners have by both the local acts power to impose rates for the purposes of those acts. The second contains a clause empowering them (g), in case they should erect or

(a) 9 D. & R. 780; 7 B. & C. 61.

(e) 1 B. & C. 389; 1 D. & R. 659.

(b) 9 D. & R. 788; 7 B. & C. 70.

(f) 3 B. & Ad. 573.

(c) 14 East, 256.

(g) 6 Geo. 4, c. cxxxviii. sect. 7,

(d) 13 East, 155.

“And be it further enacted, that

purchase an apparatus, to let or grant out lights. No doubt a profit may arise from their doing so. But the money arising therefrom is part of the general surplus, which by the terms of the act must be applied to the purposes of the act. It has been applied towards defraying the expense of lighting the town with gas, and therefore within the express direction of the act. So that if the rate appealed against were confirmed we should be compelling the commissioners to make a rate on the inhabitants tantamount to the rate made for the relief of the poor themselves. *Rex v. The Inhabitants of Liverpool* lays down the broad principle, that a public body is not rateable when its receipts are all disposed of by act of parliament.

LITLEDALE J.—The commissioners are authorized to levy a rate. Before their gas works were established they found it necessary to levy it. Now, by holding premises themselves for the purpose, they are enabled to supply the gas more cheaply than before. Their rates may therefore be reduced, and consequently all persons rateable are gainers. If the commissioners are now to be rated themselves, they must make the public pay more.

PATTESON J.—The only point to distinguish this case from *Rex v. The Inhabitants of Liverpool* is, that in the

in case the said commissioners shall deem it expedient to erect or purchase such gas apparatus, and to light the said streets, &c., or any of them, with gas, without contracting for the same as aforesaid, it shall be lawful for the said commissioners, after sufficiently lighting such said streets, &c., to let out or to grant to any person or persons whomsoever, who shall be willing to take the same, any light or lights, &c. and to supply the same with gas, upon such terms

and conditions, and at such annual rents for the same, and in such manner as the said commissioners shall from time to time think proper: provided nevertheless that all money to proceed therefrom or arise thereby be, in the first instance, applied to defray the expenses of the gas apparatus and other things connected therewith, and if there shall be any overplus, then the same shall be applied generally for the purposes of the said recited act and this act."

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latter the trustees were required by their act to lower their rates from time to time as their debts were paid off. In the present instance that provision is not expressly inserted: but it is contained in substance, in the direction to the commissioners to apply any surplus generally for the purposes of the act.

COLERIDGE J. concurred.

Order of Sessions quashed(a).

(a) See *Res v. Mayor of York*, ante, p. 539.

Monday and  
 Tuesday,  
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DOE, on the several demises of CHAWNER, HUGH  
 PHILLIPS BEAVAN and another, v. BOULTER.

A. granted an annuity to B. out of certain lands, with the usual powers of distress and entry, if the annuity should fall into arrear. A. afterwards granted a lease for years to the defendant.

The annuity having fallen into arrear, B. distrains on the defendant, and informed him that he had a charge upon the premises under lease to him; the defendant thereupon signed an agreement "to attorn and become tenant to B." and paid him rent:

—Held, that this created a new tenancy from year to year, between B. and the defendant, determinable on the payment of the arrears of the annuity, upon which the defendant's lease for years would revive.

AT the trial of this ejectment, before Patteson J., at the Radnorshire summer assizes in 1835, the case was opened as a landlord and tenant case, between *H. P. Beavan*, one of the lessors of the plaintiff, and the defendant, and the subjoined instrument, followed up by payment of rent from the defendant to *H. P. Beavan*, was relied upon to prove the tenancy.

"12th April, 1826, Llandridod Wells.

"Memorandum.—That I have this day attorned to and become the tenant of Mr. *Hugh Phillips Beavan*, of Marylebone Street, London, for a farm, lands and premises, called Nantye, in the parish of Ceffanlyss, and county of Radnor, now in my occupation; and in acknowledgment of such attornment have this day paid to Mr. *Richard Pemberton*, the authorized agent of the said *H. P. Beavan*, the sum of 1*l.* on account of the arrears of rent due to the said *H. P. Beavan*.

"*Henry Boulter.*"

Letters were also put in of a subsequent date, addressed by the defendant to *H. P. Beavan*, excusing the non-payment of rent, &c.; distresses had also been made by him, and a six-months' notice to quit had been given by *H. P. Beavan*. The counsel for the defendant proved that a Mr. *Theophilus Beavan* was entitled to a life estate in the

property, and that on July 24, 1811, he had granted a lease of sixty years to the defendant, if he, *Theophilus*, should so long live, under which lease the defendant was in possession. It also appeared, that in 1795 *Theophilus Beavan* had demised the property in question to one *Chawner*, for 99 years, at a pepper corn rent, if he, *Theophilus*, should so long live, and that on the following day *Chawner* re-demised to *Theophilus* the same premises for 98 years, at a rent of 55*l.* per annum. In these deeds it appeared that *Theophilus Beavan* had created a prior charge on the property in question. The deed of re-demise from *Chawner*, contained the following clause for re-entry:—" Provided always, that when and as often as the yearly rent of 55*l.*, hereby reserved, or any part thereof, shall be in arrear and unpaid, in the whole or in part, by the space of ten days next over or after any or either of the days or times hereinbefore limited for payment of the same, and the same shall be demanded by notice in writing, to be given by or by the agent of the said *Henry Chawner*, his executors, &c. to the said *Theophilus Beavan*, or his assigns, or to be left at the then last or most usual place of residence of the said *T. Beavan*, and the same shall not be paid within twenty-one days after such demand as aforesaid, that then, from and after such demand as aforesaid, and the expiration of such notice as aforesaid, and from time to time as often as it shall so happen, it shall and may be lawful to and for the said *Henry Chawner*, his executors, &c. to enter into and upon, and to have, hold, use, occupy, possess and enjoy the said messuages, &c. hereby demised or intended so to be, and to have, receive and take the rents, issues and profits of the same, until he or they shall, by means of the perception, or the receipt of the rents, issues and profits of the said premises hereby demised, or otherwise, be fully satisfied and paid so much of the said rents hereby reserved as shall be then in arrear, and all such and so many of the growing payments thereof as shall incur and grow due during the time that the said *Henry Chawner*, his executors,

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administrators or assigns, shall be in possession of the said demised premises, or in the receipt of the rents and profits thereof, upon and after every such entry as aforesaid, any thing hereinbefore contained to the contrary thereof in anywise notwithstanding."

The rent secured in the deed having been in arrear, *Chawner* brought ejectment, in 1823, against *Theophilus Beavan*, and recovered judgment. *Boulter*, who was then in possession, was asked to attorn tenant to *Chawner*, in order to save the expense of executing a writ of possession; but he refused, because he had heard that *Hugh Phillips Beavan* had a prior charge on the estate; he however afterwards attorned, and paid rent to *Chawner*, and no writ of possession was executed.

The counsel for the lessor of the plaintiff, in answer to the defendant's case, then proved an authority from *Theophilus Beavan* to *Boulter*, dated on the same day as the lease to *Boulter*, requesting him to pay to *Chawner*, the annuitant of his estates in &c., the yearly rent reserved, unless *Chawner* should be otherwise paid his annuity. An award, dated August 5, 1825, to which *Theophilus Beavan*, *Hugh P. Beavan*, *Theophilus* the younger, *Eliza Beavan*, and *Chawner*, were parties, was also put in. It recited a marriage settlement of August, 1785, by which *Theophilus Beavan* granted to trustees, (of whom *H. P. Beavan* was now the representative,) an annuity of 80*l.* a year, with the usual powers of distress and entry; the deeds of July, 1795, from *Theophilus Beavan* to *Chawner*, and that *Chawner* had recovered a judgment in ejectment of the premises in 1823, and was in possession of them, and that there was due to *H. P. Beavan*, as trustee of the first annuity, the sum of 800*l.*, and to *Chawner* for his annuity 218*l.*; and also reciting that *H. P. Beavan* had distrained on the tenants of the premises for the arrears of his annuity, and that *Chawner* had replevied, and that it had been agreed to refer the action of replevin, and all matters in difference between the parties thereto, to the arbitration

of a barrister, who was to decide how much was due to *H. P. Beavan* and *Chawner* respectively, and which of them was entitled to priority in respect of the two annuities. It then awarded, that *H. P. Beavan* was entitled to 880*l.* for the arrears of his annuity, and that *Theophilus Beavan* should pay him the sum of 720*l.*, and that *H. P. Beavan* was entitled to receive the residue, 160*l.*, out of the rents and profits of the estates charged therewith, in priority to *Chawner*.

A copy of this award was served upon *Boulter*, and in the April following the attornment from *Boulter* to *H. P. Beavan* was made.

The learned judge upon this case thought that the clause of re-entry only gave *Chawner* the right to maintain an ejectment against *Theophilus Beavan*, and not against *Boulter*, and that he could only recover the rent from the latter, and therefore that as the lease to *Boulter* was not put an end to by the ejectment, the attornment must be taken to be made to *H. P. Beavan*, as the assignee of the original landlord. He also thought that, even assuming the ejectment put an end to *Boulter's* lease, the attornment to *Chawner* created a yearly tenancy, which had not been determined by any notice to quit. His lordship accordingly directed a nonsuit, and gave leave to the lessors of the plaintiff to move to enter a verdict for the plaintiff, or for a new trial. *Chilton*, in Michaelmas term, 1835, obtained a rule accordingly, citing *Jemott v. Cowley* (a), *Doe d. Biass v. Horsley* (b), *Cooper v. Blandy* (c), *Partington v. Woodcock* (d).

*J. Evans* and *W. M. James* now (e) shewed cause against the rule. At the trial the award, and *H. P. Beavan's* title under it to receive the rent, were admitted, and also that he had received the rents reserved by the lease of 1811,

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(a) 1 Sid. 223, 262, 344; 1  
Saund. 112 b.; 1 Lev. 170.

(b) 1 A. & E. 756.

(c) 1 New Cas. 45.

(d) 5 N. & M. 672.

(e) May 1st.

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after the attornment of 1826, which it was contended was an attornment of *Boulter* to *H. P. Beavan*, as entitled under that lease. It was however attempted to be made out that *Boulter's* acknowledgment of *H. P. Beavan* created a new tenancy. This, however, is quite opposed to the definition of an attornment given in *Litt. s. 551*, which shews that the effect of an attornment is only to acknowledge that the reversion is in the person to whom the attornment is made, and not to create a new tenancy. [Lord *Denman* C. J. In *Cornish v. Searell*(a), the nature of an attornment is well explained by *Holroyd* J.] The only point for argument now is, whether the attornment to *Chawner*, and payment of rent to him, created a new tenancy. Now it is clear, from *Litt. s. 327*, that *Chawner* could only hold the lands in question, under the ejectment, until he was satisfied of the arrears of his annuity. *Littleton's* words are, 'Where a feoffment is made of certaine lands, reserving a certaine rent, &c. upon such condition that if the rent be behind, that it shall be lawful for the feoffor and his heires to enter and to hold the land until he be satisfied or payed the rent behind; &c.; in this case, if the rent be behind and the feoffor or his heirs enter, the feoffee is not altogether excluded from this, but the feoffor shall hold the land, and thereof take the profits until he is satisfied of the rent behind, and when he is satisfied, then may the feoffee re-enter and hold it as he held it before.' If *Chawner* therefore had been put into possession, upon his judgment in the ejectment, he must have gone out directly the arrears of the rent were paid him, and *Boulter* would have been reinstated in his term, à fortiori when *Chawner* agreed that *Boulter* should pay the rents to *H. P. Beavan*. In *Vin. Abr.* title Confirmation, a number of cases are collected, shewing the effect produced by receipt of rent by an incumbrancer, in confirming a previous use. *Chawner* had, no doubt, a right to turn *Boulter* out of possession, but having agreed to take rent from him instead, there was a mutual

(a) 8 B. & C. 471.

estoppel; then whatever interest might have been created between them was put an end to by the award. That award had the effect of constituting *H. P. Beavan* a receiver of the rents, as is always done in the Court of Chancery, when there are contending parties, and attornment is always made to the receiver, but it is never understood that such an attornment puts an end to all existing leases. Then as to *H. P. Beavan*, he no doubt has a title paramount to *Chawner*, as trustee under a marriage settlement, but he has not shewn any legal title in himself on which he can recover now.

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Sir *W. W. Follett*, *Chilton*, and *E. V. Williams*, contra (a). *Theophilus Beavan* appears to be tenant for life of this property, and *H. P. Beavan* is the trustee of an annuity, charged upon it prior to the charge to *Chawner*. The latter, no doubt, was a charge by way of annuity from *Theophilus* to *Chawner*, and the latter having obtained judgment, and a right to enter on his power of entry, agrees to accept *Boulter* as his tenant. So far *Boulter* is placed in a better position than if *Chawner* had executed a writ of possession, as he was entitled to do. Then *H. P. Beavan*, instead of bringing an ejectment to recover the arrears of his annuity, receives an attornment from *Boulter*. It is true that an attornment means strictly a case where the reversion is assigned, and the tenant in possession acknowledges the title of the assignee. In this case it was not an attornment, but an acknowledgment of a new tenancy by *Boulter*. [*Patteson J.* It would be a gross fraud to proceed on that attornment as the acknowledgment by *Boulter* of a new tenancy, as it is quite clear he never intended to give up his rights under the lease of 1811. Two parties appear to have disputes as to which of them is entitled to the rent, and it is agreed that the tenant shall pay rent to one of them; what ground is there, in such case, for saying that the tenant intended to seek a new landlord, and to put

(a) May 2d.



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an end to his tenancy of 60 years?] It is immaterial what the intentions of the parties were; the only question is, what was the legal effect of the transaction between the parties. *H. P. Beavan* had the same right to enter and take the rents and profits that *Chawner* had. [*Coleridge J.* That was not proved. You are assuming that he had a right of entry similar to *Chawner's*(a).] At all events he had the power to enter and make a distress; and it is clear, from *Havergill v. Hare* (b), that such a power gives the right to enter, to maintain ejectment, and to grant leases. Where a rent-charge is granted, and a lease is made by the grantor, the grantor of the rent-charge may come in and sweep off all the rents and profits, until the rent-charge is satisfied; *Com. Dig. Distress*, (B 2). It is clear, therefore, as *H. P. Beavan* might have distrained upon *Boulter*, *Boulter* was put into a much better condition by agreeing to be taken as tenant. For after the agreement, *H. P. Beavan* was obliged to treat him as a tenant, and waived his right to turn him out of possession, except upon six months' notice, *Cooper v. Blandy* (c). Suppose the attornment had recited the award, (and it was proved that the award was served on *Boulter*,) it would have appeared that *H. P. Beavan* had a title paramount to *Chawner*, and that he could turn out *Boulter*; the effect of the agreement then clearly is, that in consideration of *Beavan* waiving that right, *Boulter* agreed to become his tenant. Therefore, although *H. P. Beavan* had no right perhaps to the land itself, he had a right to enter and take the rents, and after the acknowledgment of him by *Boulter* as landlord, it would shake the whole law of landlord and tenant to hold that *Boulter* is not estopped from disputing his title.

It was said at the trial, that the demise from *Chawner* could not be relied upon, because there was no notice to quit from him; but *Chawner* either assented to the attorn-

(a) The right of entry was similar, but the fact was not before the Court.

(b) Cro. Jac. 510, 3d resolution.

(c) 1 New Cas. 45.

ment to *Boulter*, which would put an end to the tenancy to himself by surrender in law, or he did not assent, in which case the attornment to *H. P. Beavan*, paying rent to him, and suffering him to distrain, would amount to a disclaimer of *Chawner's* title; *Throgmorton v. Whelpdale* (a), *Doe v. Whittick* (b), *Doe d. Mee v. Litherland* (c), in either of which cases no notice was necessary. *Partington v. Woodcock* (d) was also cited.

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LORD DENMAN C. J.—The motion has been made in this case to set aside the nonsuit and to enter a verdict for the plaintiff, or for a new trial, and the question has been argued only on the ground whether the defendant was in possession as yearly tenant from *Chawner* or *H. P. Beavan*, or under the lease of 1811. Without entering into the history of the deeds, which contain the title to the property in question, these facts are clear. *Chawner* having a charge upon the estate, brings ejectment against the defendant, who was the tenant in possession under a lease from *Theophilus Beavan*; no writ of possession was executed, but the defendant was continued in possession on an agreement to pay rent to *Chawner*; and during the progress of this ejectment it is impossible to suppose but that the defendant must have discovered that *H. P. Beavan* had also a claim on the land. In 1825, it appears that differences took place between the two incumbrancers, *Chawner* and *H. P. Beavan*, which were referred to arbitration, and it is admitted that the award made on that occasion was served on *Boulter*. That award ordered *Boulter* to pay his rent to *H. P. Beavan*. In the spring of 1826, an agreement was entered into by *Boulter*, which is called an attornment. (His lordship here read the agreement.) This is a clear acknowledgment by *Boulter* of his being tenant to *H. P. Beavan*. It also appears that *H. P. Beavan* had served *Boulter* with a notice to quit, and that the arrears of his annuity are still

(a) Bull. N. P. 96.

(c) 6 N. & M. 313.

(b) Gow, 195.

(d) 5 N. & M. 672.

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unpaid. Taking these facts together, the result clearly is, that *Boulter* became tenant from year to year to *H. P. Beavan*, until the arrears of the annuity were paid off, and that was the relation acknowledged to exist by the document of 1826. The only mode by which that acknowledgment could be got rid of was, by some fraud having been practised on *Boulter*, of which there is not the slightest trace, or by a misconception on his part of what he was doing. But if that had been the case the question should have been submitted to the jury, which it does not appear that the defendant at all required to be done, or that there were any grounds for its being so left. I do not, however, give any opinion as to what a jury might have said, if those two points had been left to them. All that we have to do now is, to decide upon the legal effect of the agreement entered into by the defendant. And as my learned brother informs us, that he should have directed a verdict to be entered for the plaintiff, had it not been for another point, on which he has now altered his opinion, being clearly of opinion, as I am, that a tenancy from year to year existed between *H. P. Beavan* and the defendant, I think the verdict must be entered for the plaintiff.

LITLEDALE J.—By the deeds of 1795, a right of entry was reserved to *Chawner*, if the rent should remain unpaid. On looking at the instrument called an attornment, I think we are not bound by the technical terms, “attorning and becoming tenant,” used in it, but we are to see what the relation created between the parties by it was; and I think we ought to look upon it as if it recited the award. By that it appears that the trustees created by the settlement of 1785, and *H. P. Beavan*, their assignee, had a title paramount to the land in question, and that *H. P. Beavan* was entitled to turn *Boulter* out of possession. Having power to bring ejectment and obtain possession, an arrangement is come to with *Boulter*, by which *H. P. Beavan*, though in strictness not a landlord, being only entitled to

receive the rent, but still having the power of entry, assumed the power to grant a lease, and there is no objection to his taking upon himself the character of landlord, which he called himself, and *Boulter* calls himself his tenant. This, therefore, though not perhaps strictly a tenancy from year to year, as it would only enure until the arrears of the annuity were paid, amounts to the same thing, and therefore I think the lessor of the plaintiff is entitled to the verdict. At the same time it is clear, that as soon as the arrears are satisfied, the defendant is entitled to be reinstated in his former possession.

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PATTESON J.—The nonsuit in this case cannot be supported on the ground taken at the time, for I was clearly mistaken in supposing that *Chawner* was not in a condition, in 1823, to maintain ejectment against the present defendant. I thought that the clause of entry in the deed of 1795, only enabled *Chawner* to obtain possession, if the land should be in the possession of *Theophilus Beavan*, but that it did not enable him to turn any other party out. I believe I was mistaken, for *Doe d. Biass v. Horsley (a)* shews that a clause of entry, like that in the deed of 1795, gives the right to get possession without demand, and without regard to the person who may be in actual occupation.

The question then is, whether the nonsuit can be supported on any other ground, and it is said that it cannot, because the effect of the agreement between *H. P. Beavan* and the defendant was, to create a new tenancy from year to year, until the arrears of the annuity were paid; and that *H. P. Beavan* being the first incumbrancer, had a right to enter into the land. If the case had been based upon the supposition that *Boulter*, in agreeing to become tenant to *H. P. Beavan*, intended to give up his rights under his 60 years, I think it would have been a gross fraud upon him, and I am sure that no jury would have found any thing of the kind. But nothing like fraud is suggested, nor even

(a) 1 A. & E. 766.

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any misconception on the part of *Boulter*, and therefore it is immaterial whether he knew or not what he was doing, as he can only hold such interest in the estate as the law allows. I am of opinion that by the necessary implication of law he became a tenant from year to year on that attornment to *H. P. Beavan*.

COLERIDGE J.—I am of the same opinion, and I feel it only necessary to recapitulate one or two facts on which I form my judgment. *Boulter* was the under-lessee of *Theophilus Beavan*, who himself held under a lease subject to the infirmity of the clause of re-entry by *H. P. Beavan*, the prior incumbrancer, and the similar power by *Chawner*, the second incumbrancer. In this state of things, *Chawner's* annuity being in arrear, he brings ejectment against *Theophilus Beavan* and recovers judgment, and he puts himself into a position to enter and take possession, not to destroy the lease from *Theophilus Beavan*, for that he could not do, but to hold the rents and profits until the arrears are paid. He does not however execute his writ of possession, but enters into an agreement with *Boulter*, the tenant in possession, the legal effect of which is to make the latter a tenant from year to year. The prior incumbrancer, *H. P. Beavan*, then comes forward, and wants the arrears of his annuity; that leads all the parties to arbitration, the result of which is, that *H. P. Beavan* is to receive his arrears out of the rents. The award recites that he has the usual powers of distress on the premises, so that it is clear that he had the power to come in. That award was served on *Boulter*, so that he was aware of the claim of *H. P. Beavan*, as he also was at the time of his attornment to *Chawner*, in 1823. With regard to the demise from *Chawner*, my difficulty is certainly not removed, as *Boulter* received no notice to quit from him, and therefore the tenancy created by the attornment to him is not put an end to. I decide, however, on the effect of the agreement of *Boulter* with *H. P. Beavan*, which I think creates a yearly

tenancy. It may be that *Boulter* considered he was still in possession under his tenancy of 60 years; but if the law puts a certain construction upon the acts of parties, it is not important to know what the intentions of the parties were, no fraud or misconception being suggested, and of which indeed there is not the slightest vestige. This being so, it reduces the case to a question between landlord and tenant, and it is almost needless to say, that there is no part of the civil law of England which it is more important to preserve on a solid basis, than landlord and tenant law.

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Rule absolute to enter a verdict for the lessor
 of the plaintiff.

SAXON v. G. CASTLE the elder, G. CASTLE the younger,
 and THOMAS BROWNE.

Monday,
 May 1st.

DECLARATION stated, that before the committing of the grievances thereafter mentioned, an action of assumpsit had been commenced in the Sheriffs' Court of the city of London, at the suit of the defendants, *Castle* the elder and *Castle* the younger, against the plaintiff, for money had and received by the plaintiff for the use of the said defendants; and that the action being so pending, in pursuance of an agreement between the said parties, the plaintiff (defendant in that action) executed a warrant of attorney to *Henry Lang* and the defendant *Thos. Browne*, attorneys, authorizing them to suffer judgment to be entered against him, the said plaintiff, in an action of debt for 100*l.* and costs, in the King's Bench; and that a memorandum was indorsed upon the said warrant of attorney, declaring it to be given by the plaintiff to the said defendants to secure the payment of 18*l.*, to be paid by three equal instalments, together with the costs of the action in the sheriffs' court, the said costs to be taxed by the Master as between attorney and

In case for malicious arrest, the declaration is bad after verdict, on motion in arrest of judgment, for stating that the defendant "wrongfully and injuriously" procured the writ to issue, and caused the plaintiff to be arrested, without the addition of the word "maliciously."

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client, to be paid within four days after such taxation: on default of payment of any of the said sums, judgment to be entered up and execution to issue for the whole or any part then due. Averment, that although at the time of the committing the grievances thereafter mentioned only 12*l.* of the debt remained due, and the costs had not been taxed, nevertheless the said defendants, contriving and intending to cause the plaintiff to be imprisoned for a greater sum of money than was justly due, according to the tenor of the said memorandum, &c., and contriving to injure the plaintiff, &c., did, on the 6th February, 1834, *wrongfully and injuriously* procure a *ca. sa.* to issue under colour of the said judgment for a debt of 100*l.* and 3*l.* 5*s.* costs and damages in the sheriffs' court, indorsed with a direction to the sheriffs, requiring them to levy the sums of 62*l.* 12*s.*, and 10*s.* 6*d.* besides sheriffs' poundage, &c., being a much greater amount than was then due. The declaration then stated the delivery of the writ to the sheriffs, the arrest of the plaintiff, and his detention in custody for the sums indorsed on the writ, and lays the damages at 500*l.* Pleas:—1. Not guilty. 2. That before and at the committing the said supposed grievances the sum of 18*l.* remained due to the defendants, *G. Castle* the elder and younger, and that afterwards, and before the committing of the said supposed grievances, to wit, on 7th December, 1833, the costs incurred in the cause, in the said memorandum mentioned, were taxed by the Master at the sum of 44*l.* 12*s.*, making together with the said sum of 18*l.* the total sum of 62*l.* 12*s.*; whereupon the said defendants, the *Castles* and *T. Browne*, procured the writ to issue, indorsed as aforesaid, &c. Replication to the second plea, de injuriâ.

On the trial at Guildhall, before Lord *Denman* C. J., it appeared that by the Master's allocatur of 7 December, 1833, the following sums were awarded;—"Allocatur 41*l.* 7*s.*; debt 18*l.*; costs of judgment 3*l.* 5*s.*; making together 62*l.* 12*s.*:" that this allocatur was founded on a

misrepresentation by the attorney of the defendants, the *Castles*, that the costs in the sheriff's court had been taxed already, which in fact had not been done; that judgment was signed in the default of payment of costs, as mentioned in the defeazance, on the 12th December, four days after the allocatur; and on the following day the writ issued, and the plaintiff was arrested on the 17th. The plaintiff's attorney then took out a summons to shew cause why the judgment should not be set aside for irregularity, and why the Master should not review the taxation. In pursuance of an order obtained on this summons, the Master reviewed the taxation, and the whole amount was reduced by a second allocatur to 43*l.* 16*s.* An order was then obtained for the release of the plaintiff; a second execution was issued for the reduced sum, which the plaintiff paid. The jury found for the plaintiff. A rule nisi had been obtained for a new trial on several grounds, with liberty to move in arrest of judgment, on the ground of the omission of any averment of malice in the declaration, and that the action was misconceived, and should have been brought against the attorney of the two *Castles* for misrepresentation.

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Swann now shewed cause. In the case of *Wentworth v. Bullen* (a), which was an action for a wrongful arrest for a larger sum than was due, it does not appear that the word "maliciously" was inserted in the declaration. Here express proof of malice is unnecessary, because it may be inferred from the transaction itself; the defendants must have been aware of the fact that the costs had not been taxed; and therefore the allegation is unnecessary also. The declaration is at all events good after verdict, containing, as it does, the words "wrongfully and injuriously." As to the other point, an action for false representation might have been brought; but it was optional to proceed in case against the present defendants; the wrong taxation must be supposed a collusive proceeding.

(a) 9 B. & C. 840.

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Bayley, contra. The only grievance which is in substance alleged is, that the attorney improperly represented to the Master that the costs in the sheriffs' court had been taxed, when in fact they had not. The action therefore should have been framed on the false representation by the attorney.

(On the other point he was stopped by the Court.)

LORD DENMAN C.J.—The action was properly brought against the present defendants. But the declaration is bad for want of averment of malice, which is the very gist of the action; *Scheibel v. Fairbain* (a). Where malice is not necessarily inferred from the circumstances, proof must be given of it; and it must of course be alleged in order to be proved; *Gibson v. Chaters* (b), *Sinclair v. Eldred* (c).

LITLEDALE J.—It is alleged in the present case that the defendants may be fairly presumed to have been conscious of the fact, that the costs had never been taxed; that malice is therefore inferable, *prima facie*, from their conduct; and consequently that it was not necessary to allege or to prove it. But such express averment has always been held necessary.

PATTESON J.—The misrepresentation to the Master was only the origin of the grievance, and not the grievance itself complained of. The action is therefore well conceived; but the declaration is bad for want of the necessary averment of malice.

COLERIDGE J. concurred.

Rule absolute on the first point only (d).

(a) 1 Bos. & P. 388.

(b) 2 Bos. & P. 129.

(c) 4 Taunt. 7.

(d) See also *Goslin v. Wilcock*,

2 Wils. 302. In case for slander, the word "falsely" alone has been held to be sufficiently expressive of a malicious intent. See 1

Saund. 242 a, n. 2, and the cases cited there; Moore, 459; Owen, 51; Styles, 392, where *Rolle C.J.* was of opinion, that in a declaration it is not necessary to use the words "falsely and maliciously," but in an indictment or information it is. Mr. Serjt. *Williams* adds, "I suppose he meant, that after verdict the omission of them would be helped in a declaration."

In *Mitward v. Serjeant* (mentioned in a note to *Harman v. Tappenden*, 1 East, 555), which was case against a returning officer for refusing a vote, it appears that *Ashurst J.* thought that the words "wrongfully intending to injure" were sufficient to support evidence of malice without the word "maliciously."

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WEDGE v. The Hon. MAURICE FREDERICK FITZ-
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TRESPASS. The first count stated, that the defendant assaulted the plaintiff. The second count, that he seized and carried away certain goods of the plaintiff. At the trial before *Littledale, J.* at the Sussex summer assizes in 1835, it appeared that on the 7th of May, 1835, two sons of the plaintiff were proceeding homeward along the public road wheeling a barrow belonging to the plaintiff, in which there was some grass, which they had cut, by the plaintiff's orders, in a field belonging to a relation of his, and to whom the plaintiff was bailiff. The defendant, who was a magistrate, met them with the wheelbarrow on the road, and asked one of them where he had got the grass. He told him that he had cut it by his father's orders, and with the permission of the owner of the field; upon which the defendant said it was stolen property, and that he should detain it. The plaintiff then called his coachman, who, by his direction, wheeled away the barrow and grass, and took them to the defendant's premises. It appeared upon the cross-examination of the plaintiff's witnesses, that the defendant, when he spoke to the plaintiff's sons, said, that he was a magistrate. This was the plaintiff's case. It was then objected, that the plaintiff ought to be nonsuited, as no notice of action had been given, as required by 24 G. 2, c. 44. The

A magistrate who does a wrongful act (as in person unjustifiably arresting an individual), but who really believes that he has a right to do the act in his capacity of justice of the peace, is entitled to notice of action. If he had reasonable grounds for what he did, he is justified in law.

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defendant called witnesses, and it appeared from their evidence, that the defendant had said that he should detain the grass as a magistrate, and that he had offered to return the grass the same evening. The charge of assault was abandoned. The learned judge, in summing up, told the jury, that as the plaintiff was a magistrate, if he had reasonable ground to suspect that the property had been stolen, he was justified in seizing it. The jury found a verdict for the plaintiff on the second count, and assessed the damages at 5*l*. Leave was given by the learned judge to the defendant to move to set aside the verdict and enter a nonsuit, on the ground that notice of action had not been given. In Michaelmas term, 1835, *Platt* obtained a rule nisi to enter a nonsuit accordingly; against which,

Turner now shewed cause. The defendant was not entitled to notice of action. A magistrate, in the ordinary execution of his duty, does not put the law in motion; he waits until a complaint is made to him, he then summons the party accused, or issues a warrant against him, and on his appearance examines witnesses in his presence, and calls on him for his defence; if, under such circumstances, a magistrate acts illegally, he is entitled to notice of action. But if he chooses to set aside every form of legal proceeding, and, merely because he is a magistrate, takes upon himself to stop an individual on the highway, and charges him with felony, or seizes property in his possession as stolen property, without any reasonable cause whatever, a magistrate so acting is not entitled to protection any more than a private individual; or, at all events, he acts at the same peril as a constable would do in such a case. If a private individual arrests another as a felon, he must shew that a felony has been actually committed by the party, but a constable may arrest if he has reasonable ground of suspicion that the party arrested has committed a felony. So if a magistrate thinks proper to arrest a person, he must shew that he had reasonable ground of suspicion. The

power of a magistrate to arrest is considered, in *Hawkins, Pleas of the Crown* (a), to be the same as that of the constable. So also in 2 *Hale, Pleas of the Crown* (b). In *Cooke v. Leonard* (c) it was held, that the question in cases of this description is, whether the party had any colour of authority to do the wrongful act, and it was held in that case that he had not. Here there was no colour of authority. [*Littledale, J.* Suppose the jury had found that the defendant had no reasonable or probable ground for suspicion, then the plaintiff would be entitled to a verdict, but it does not follow that the defendant is not entitled to notice of action.] The jury in this case have found that the defendant had no ground of suspicion, and the circumstance of his saying that he was a magistrate does not shew that he was acting in the character of a magistrate. Why is a person who steps out of his usual course, and without any reasonable ground of suspicion, seizes property in the possession of another as stolen property, to be protected? It must be assumed against the defendant, that he had no reasonable ground of suspicion, for the jury have so found by their verdict. In *James v. Saunders* (d), the defendant, who was a magistrate, had arrested the plaintiff for a riot, although no disturbance was going on in the immediate neighbourhood, and the plaintiff was passing along the street: *Bosanquet J.* told the jury, that the defendant was not acting in his capacity of magistrate, but that if they thought that he was bona fide under an erroneous impression, they might give damages accordingly. *Tindal C. J.* said, that it must be taken as if by consent: that the Court was substituted for the jury, and the Court must consider the question as if it were a motion for a new trial upon a verdict against evidence: and the Court held, that, under the circumstances, the defendant was not entitled to notice. So, in this case, if the Court is satisfied that justice has been done by the

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(a) Book 2, chap. 13, sect. 13.

(b) Page 87.

(c) 9 D. & R. 339; S. C. 6 B. & C. 351.

(d) 10 Bing. 429.

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verdict, it will pursue the course taken by the Court of Common Pleas in the case of *James v. Sanders*, and allow the verdict to stand; the damages are temperate. [Lord Denman C. J. In *James v. Saunders*, Bosanquet J. was not asked to put the question to the jury, whether the defendant was acting *bonâ fide* in his capacity of magistrate.] It does not appear that that question was distinctly put to the jury in the first case, but the circumstances shew that the defendant was not acting *bonâ fide*.

Platt, *contra*. It was assumed, and was taken for granted at the trial, that the defendant had acted *bonâ fide* as a magistrate. The contest was, whether he had reasonable ground of suspicion, because, if he had, he was entitled, not merely to notice of action, but to the verdict. In *Staight v. Gee* (a), it was held, that a constable who imprisons a person on suspicion of felony, without any reasonable grounds, of his own authority, without any warrant or charge, is within the statute 21 Jac. 1, c. 12, which requires the venue to be laid in the proper county. Wherever the venue must be laid in the proper county, there notice of action must be given. *James v. Saunders* (b) determines that if a party is acting *bonâ fide* as a magistrate, however improperly, he is entitled to notice of action. The same rule was laid down in *Cook v. Clark* (c), and in *Hopkins v. Crowe* (d). The object of requiring notice to be given to the magistrate is, that he may have an opportunity of tendering a sum of money as a compensation to the injured party for the wrong he has committed.

Lord DENMAN C. J.—This is a question, whether the defendant, who is a magistrate, and who has been sued for making a seizure of some grass, is entitled to notice of action. He is entitled to notice if he believed he was acting in the execution of his duty. If he had a reasonable ground *to suppose* the property was stolen, he would be en-

(a) 2 Stark. 445.

(b) 10 Bing. 439.

(c) 10 Bing. 19.

(d) 7 C. & P. 373.

titled not only to notice of action but to a verdict. The jury have found that he had no reasonable ground to suppose the property had been stolen. The question therefore remains, whether he believed he was acting in the execution of his duty. I am of opinion that he did intend to act as a magistrate. At the close of the plaintiff's case the defendant claimed a nonsuit, on the ground that notice of action had not been given. The plaintiff did not require that the question, whether the defendant had acted *bonâ fide* as a magistrate, should be put to the jury, and, as that question was not put, it must be taken he acted *bonâ fide*. He was therefore entitled to notice of action, and the rule for a nonsuit must be made absolute.

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LITLEDALE J.—There would have been a verdict for the defendant if he had had reasonable and probable cause to suppose that the grass had been stolen. Whether a magistrate is entitled to notice of action, and whether he is wholly justified in what he has done, are two very different questions. If notice be given, the magistrate, if he has acted wrongly, may tender amends. In this case the magistrate found, on investigation, that he had no right to retain possession of the grass. If a magistrate acts with bad faith, as from motives of malice or spite, he is not entitled to notice. But that is not the case here. See what the facts are. The witness said he was wheeling some grass in a wheelbarrow on the highway, that he met Captain *Berkeley*, who asked what he had got, and, upon his reply to that question, Captain *Berkeley* said he should detain the grass as stolen property. The witness then said it was his father's property. Captain *Berkeley* did not act merely colourably as a magistrate from motives of malice or spite, and therefore he is entitled to notice of action.

PATTESON J.—There were two questions to be considered in this case; first, whether the magistrate *bonâ fide* believed he was acting in the execution of his office; and,

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secondly, whether he had reasonable ground of suspicion that a felony had been committed by the plaintiff. The first question was not put to the jury, and it undoubtedly is a question for their determination. That is the decision in *James v. Saunders* (a). It appears that in this case a nonsuit was applied for, on the ground of want of notice. The plaintiff, in reply to that application by the defendant, did not say you did not act *bonâ fide* in the execution of your office, and request the judge to put that question to the jury. It seems, therefore, to have been assumed he did act *bonâ fide*. If so he is entitled to the protection of the statute, and to notice of action. In most of the cases on the subject the question of *bona fides* has not been put to the jury, but it has been assumed by the Court, and the question has been the construction of the particular statute. I can well understand why the second question was put to the jury, because, if the defendant had reasonable ground of suspicion, he was entitled to a verdict.

COLERIDGE J.—The distinction is clear between what is a defence to the action, and what entitles a magistrate to notice. He may be entitled to notice under circumstances where he has no defence, where he has acted in a manner apparently within his jurisdiction; but where he has exceeded the authority he possesses. A party is entitled to notice if, without authority, he has taken upon himself to act as a magistrate in the *bonâ fide* belief that he has full authority to act in that capacity; as, where a statute requires an act to be done by two magistrates, and one only has done the act. Both these are matters to be submitted to the consideration of a jury. The plaintiff has always a right to say, I do not think the facts clear, I wish to ask the jury, whether the defendant did believe he was acting in the execution of his office. The greater number of these cases have been applications for a nonsuit, where it has been assumed that a party has acted *bonâ fide*. The

(a) 10 Bing. 429.

defendant here applied for a nonsuit ; I do not find that the plaintiff said, at all events, this is a matter to be put to the jury. I have very little doubt that the magistrate did act in the execution of his duty.

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Rule absolute (a).

(a) See *Ballinger v. Ferris*, 1 S. C. 8 B. & C. 697; *M'Cloughan*
M. & W. 628; *Beechey v. Sides*, 4 v. *Clayton*, Holt, N. P. C. 478;
M. & R. 634; S. C. 9 B. & C. 806; *Pratt v. Hillman*, 7 C. & P. 22;
Edge v. Parker, 3 M. & R. 365; *Wells v. Ody*, 6 D. & R. 360.

JOHN RANSFORD, one of the Public Officers &c. of the
 Leamington Bank, v. COPELAND.

ASSUMPSIT against the defendant as acceptor of a bill of exchange that had been indorsed to the Leamington Bank. The plaintiff sued as "*John Ransford*, residing in England, one of the public officers of certain persons united in copartnership, carrying on the trade or business of bankers in England, under the name of the Leamington Bank, according to the form and effect of the statute in such case made and provided, and nominated and appointed such public officer as aforesaid, and registered as such, as directed and required by the said statute, which said *John Ransford*, as nominal plaintiff in this action, now sues for and in behalf of the said persons so united in copartnership." Plea, that the said persons so united in copartnership, carrying on the trade or business of bankers in England, as in the declaration mentioned, were and consisted of more than six persons, to wit, 100 persons, and that they were illegally associated together, and carried on the trade or business aforesaid, with the view and for the purpose of borrowing and taking up in England sums of money on their bills or notes, payable on demand or at a less time than six months from the borrowing thereof, during the continuance of the privilege granted by a certain

An allegation in a plea to a count on a bill of exchange, that the plaintiffs were a banking company, consisting of more than six persons, and that they were illegally associated together under 3 & 4 Will. 4, c. 98, is compounded of law and fact, and therefore traversable.

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statute made and passed in the session of parliament holden in the 3rd and 4th years of the reign of his present majesty, to the governor and company of the Bank of England. Verification.

Replication, that the said persons so united in copartnership were not illegally associated together, nor did they carry on the said trade with the view or for the purpose in the said plea alleged, modo et formâ, and this &c.

At the trial at the last spring assizes at Warwick, before Lord *Abinger* C. B., it was admitted, on the part of the Leamington Bank, that they were bankers,—that the company consisted of more than six partners, and that the Bank was in the habit of drawing bills upon London at shorter dates than six months; and it was contended upon this that the defendant was entitled to a verdict. Lord *Abinger*, however, thought that the plea put in issue the fact of their carrying on business as bankers within sixty-five miles of London, and as that was not proved, he directed the verdict to be entered for the plaintiff, with leave to enter it for the defendant, if the Court should be of a different opinion.

G. Hayes now moved accordingly (a). The replication in this case only put in issue the facts mentioned in the plea, namely, that the company were associated for the purpose of borrowing money on their bills, payable on demand or at a less time than six months. The lord chief baron held, that as the plea alleged that the company was illegally associated, it was necessary for the defendant to prove that they carried on banking business within sixty-five miles of London.

By the 39 & 40 Geo. 3, c. 28, certain exclusive privileges of banking were given to the Bank of England, and it was made illegal (sect. 15) for partnerships exceeding six in number to take up money on their bills or notes at less

(a) Before Lord *Denman* C. J., *Littledale*, *Patteson*, and *Coleridge*, Js.

than six months date. The 7 *Geo.* 4, c. 46, enabled banking partnerships to consist of more than six persons, and to issue bills or notes payable on demand or otherwise, and to borrow and take up money on their bills or notes, provided they carried on their banking business more than sixty-five miles from London. By the 3 & 4 *Will.* 4, c. 98, the privileges of the Bank of England (as modified by the 7 *Geo.* 4, c. 46,) were extended for a further term of years, and it was enacted, that companies, &c. exceeding six in number, might carry on business in London or within sixty-five miles, provided they did not borrow or take up in England any money on their bills or notes, payable on demand or at any less time than six months from the borrowing thereof, during the continuance of the privilege of the Bank of England.

The plea in this case appears to have been framed with reference to these statutes, but it does not allege that the Company were associated for the purpose of taking up money on their notes within sixty-five miles of London. The question, whether or not the plea would have been bad on demurrer for want of this allegation, does not now arise; for the plaintiff having traversed the plea, the only point now is, what proof was necessary at the trial upon the issue joined between the parties. It is submitted that nothing was put in issue but the specific allegations of fact contained in the plea, and that as these were admitted to be true, the defendant was entitled to a verdict. The word "illegally," as used in the plea, does not import any additional facts beyond those mentioned in the plea, but is merely an inference drawn by the defendant from the facts specifically stated. It is equivalent to the words "wrongfully and injuriously," or "against the form of the statutes," and cannot have the effect of increasing the burthen of proof under the issue. [*Patteson J.* Do you contend that if the plea had been demurred to, the illegality would not have been admitted?] Nothing would have been admitted but the facts stated in the plea; nor is any thing more tra-

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versed here. Illegality is a conclusion of law which is not traversable, and upon which a jury cannot decide. [*Paterson J.* In a declaration for arresting without reasonable or probable cause, the facts are not alleged, but the question of probable cause is decided by the verdict of the jury; which shews that there may be something submitted to the jury, which, on the face of it, appears to be a conclusion of law.] There are one or two excepted cases, in which mixed questions of law and fact may be determined by a jury; but if, in a case like the present, the word "illegally" is to be considered as forming a substantial part of the issue, much inconvenience will arise; for, independently of the objection that the jury cannot determine what is legal or illegal, the effect would be to let in proof of any facts tending to shew illegality in the constitution of the Company, without confining the defendant to the facts specifically alleged in the plea. It is a general rule that no traverse can be made of matter of law (a). And it is also a rule, that pleas must be so pleaded as to be capable of trial, and must therefore consist of matter of fact (b): and that if a defendant plead that *A. lawfully* enjoyed the goods of felons, it will be bad, for the jury cannot determine whether he lawfully enjoyed (c). Here the plea does contain specific facts, and the word "illegally" is no more than an inference drawn by the defendant from those facts, and is equivalent to the words "*contra formam statuti*." Those words are unnecessary in a plea which states facts, shewing illegality under the provisions of an act of parliament (d); and they will not cure a defect in a plea which omits to bring the case within the provisions of an act of parliament (e). If the word "illegally" here enlarges the issue, the same consequence would result from the words "*contra formam statuti*:" and in either case the jury will determine matters

(a) 1 Chit. Pl. 612, 6th ed.; 1 Wms. Saund. 23, n. (5). (d) *Peate v. Dicken*, 1 C., M. & R. 422.

(b) Co. Litt. 303 b.

(e) See 1 Wms. Saund. 135,

(c) 1 Chit. Pl. 540, 6th ed., citing 9 Rep. 25. n. (3).

of law. Trials will take place on facts not stated on the records; and no writ of error will lie if any mistake occur. If the plea had merely stated that the Company were illegally associated together, without any thing further, and issue had been joined on this, a jury could not have tried the question. [*Patteson J.* In that case there would have been no issue at all.] If the allegation that the Company were illegally associated could not have raised an issue of fact by itself, neither can it have the effect of enlarging the issue in this case. As it stands in this plea, it can be taken to be nothing more than an inference drawn by the defendant from the facts set forth in the plea: the defendant, having proved those facts, is entitled to the verdict; and the question whether those facts form an answer to the action may be raised on motion for judgment non obstante veredicto.

Lord DENMAN C.J.—The plaintiff certainly had another course, because he might have replied that the Bank carried on business more than sixty-five miles from London; and the inconvenience of these general allegations is great, because the defendant might set up a defence arising from any other breach of the provisions of the 7 Geo. 4, c. 46, with regard to the formation of the Company. At the same time it is monstrous if the defendant is answered in the way he clearly meant his plea to be understood, that he should come here and contend that the plea does not present such an issue. We will look into the point, but will not grant a rule if we can help it.

Cur. adv. vult.

Lord DENMAN C. J., on a subsequent day in this term, delivered the judgment of the Court.—This was an action on a bill of exchange, brought in the name of one of the public officers of a banking company, under the 7 Geo. 4, c. 46. The defendant pleaded that the Company consisted of more than six, &c.; that they were illegally associated

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together, and carried on trade for the purpose of borrowing and taking up money on their notes, payable on demand, during the continuance of the privilege granted by the 3 & 4 Will. 4, to the Governor and Company of the Bank of England. The replication traversed that they were illegally associated, or carried on trade *modo et formâ*. At the trial the defendant proved that the Company did take up money on their notes, payable on demand, and insisted that such proof entitled him to a verdict, inasmuch as the illegality of the association was not put in issue by the replication, being matter of law, which is not traversable. The learned judge held that it was incumbent on the defendant to go further, and prove the trading within sixty-five miles of London (in order to shew the illegality of the association), and for want of such evidence directed a verdict for the plaintiff. It is now admitted that the plea is bad; but contended, as at the trial, that it was proved in fact. The question is, whether the allegation in the plea, that the Company was illegally associated, is an allegation of a mere result of law, or of law and fact mixed. The distinction is obvious; and all the authorities (most of which are referred to in *Lucas v. Nockells* (a)) turn upon it.

We are clearly of opinion that the allegation in this case is one compounded of law and fact, and therefore traversable. The plea does not state certain facts, and then go on to allege *whereby* the association was illegal, or any words to that effect, but contains a distinct and separate allegation, "that the said association was illegal" within the stat. 3 & 4 Will. 4, c. 98. It is plain that if it were so illegal, that illegality must arise from some fact, or the absence of some fact, either of which required to be established by proof; and such proof is necessarily matter for the consideration of a jury. We think that the learned judge was quite right in requiring such proof, and that the verdict must stand.

Rule refused.

(a) 10 Bing. 157.

JONES v. LITLEDALE and others.

ASSUMPSIT for not delivering a quantity of hemp alleged to have been bought by the plaintiff of the defendants. There was also a count for money had and received. The defendants pleaded to the first count, and all but 52*l.* in the second count, non assumpsit, and as to 52*l.* a tender.

At the trial before *Patteson J.* at the last Liverpool assizes, it appeared in evidence that the plaintiff had bought by auction, at the rooms of the defendants, who were brokers at Liverpool, the hemp in question, to be paid for at certain times then agreed on: that the defendants afterwards sent an invoice of the goods, headed,

" Jones,
Bought of J. and H. Littleale,
64 bales of hemp.

Payment, 14 days and six months.

Received on account 100*l.*, Oct. 31.

Settled, Nov. 26."

(Signed by defendants' clerk.)

That the plaintiff, on the 31st day of October, paid the defendants 100*l.*, and afterwards, on the 26th day of November, the residue, 52*l.* (a), and on the latter day asked for a delivery order. An order on Messrs. *Copeland* and *Duncan* was given him, which, on being presented the same day, was refused; and one of the defendants being applied to, said that he would see his attorney and procure the delivery; but the defendants never did procure the delivery. In answer, the defendants offered to prove that the hemp was advertised in two newspapers, which the plaintiff was in the habit of seeing, for sale at the rooms of the defendants, with a reference to *Copeland* and *Duncan*, merchants; that it was sold by auction at the defendants' rooms, under printed conditions of sale, describing the defendants as the seller's brokers, but not

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Wednesday,
April 19th.

The plaintiff bought a quantity of hemp by auction at the rooms of the defendants, who were brokers in Liverpool. The defendants delivered an invoice in their own name as sellers. On payment being made by the plaintiff, the defendants gave him an order on C. and D. for the goods, which on presentation was refused, and the plaintiff could not obtain delivery of the goods: Held, that the defendants were bound by the representation in the invoice, and could not offer evidence to show that they sold as agents for C. and D., and that the plaintiff knew C. and D. to be the principals at the time of the sale by auction.

(a) The tender of 52*l.* by defendants was admitted on the trial.

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mentioning the name of the seller. That the defendants had made advances to Messrs. *Copeland* and *Duncan* on these and other goods, and that the custom at Liverpool was for brokers, when they had made advances, to deliver invoices in their own names, in order to secure the passing of the purchase-money through their hands. That Messrs. *Copeland* and *Duncan* became bankrupts, and that a fiat issued on the 25th of November.

The learned judge thought that these facts, if proved, constituted no defence to the action, and directed a verdict for the plaintiff, with leave to the defendants to move for a new trial.

Cresswell now moved for a rule to shew cause. The question was, whether the plaintiff knew, at the time of the contract, that the defendants were selling for a third person. If so, the defendants would not be bound, their principal being known. The sale by auction was the contract from which, together with the previous advertisement, it was apparent that the plaintiff knew that the defendants were merely agents. The subsequent delivery of the invoice by the broker will not alter that contract. If the defendants, as brokers, had stated in express terms, when the contract was made, that the goods belonged to Messrs. *Copeland* and *Duncan*, the delivery by invoice by them, in their own names, would not have destroyed that contract. If the plaintiff had paid the 100*l.* within fourteen days, *Copeland* and *Duncan* having continued solvent up to that time, he would have obtained the goods. As it is, the 100*l.* must be taken as paid to the principals, and may be proved under the fiat against them. There are authorities to shew that parol evidence may be given, notwithstanding the form of an invoice, to charge a defendant not named in that invoice: and by analogy it must be equally receivable to exonerate a defendant named in it: *Moore v. Clementson* (a). *Warner v. M^r Kay* (b) shews

(a) 2 Campb. 24.

(b) 1 Mee. & Wels. 591.

that the invoice is not the contract. The learned judge should therefore have allowed the defendants to give evidence to shew who was the real contracting party. If that had been received, it must have been taken that the payment by plaintiff to the defendants, with the sanction of the defendants' principal, was in fact payment to the principal.

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Cur. adv. vult.

Lord DENMAN C. J., on a subsequent day, after recapitulating the facts as stated above, gave the judgment of the Court.—There is no doubt that evidence is admissible on behalf of one of the contracting parties, to shew that the other was agent only, though contracting in his own name, and so to fix the real principal; but it is clear that if the agent contracts in such a form as to make himself personally responsible, he cannot afterwards, whether his principals were or were not known at the time of the contract, relieve himself from that responsibility. In this case there is no contract signed by the sellers, so as to satisfy the statute of frauds, until the invoice by which the defendants represent themselves to be the sellers; and we think that they are exclusively bound by that representation. Their object in so representing was, as appeared by the evidence of custom, to secure the passing of the money through their hands, and to prevent its being paid to their principals; but in so doing they have made themselves responsible, and we think it impossible to read the invoice in the sense proposed.

Rule refused.



1857.

Friday,
April 21st.

The writ de contumacè capiendo must be addressed to the sheriff of the county of which the party contumacious is described in the significavit, and if addressed to the sheriff of a different county, the Court will quash the writ.

The KING, upon the Prosecution of BODENHAM and others, v. THOMAS BOURKE RICKETTS, Esq.

SIR F. POLLOCK, in Michaelmas term last, had obtained a rule calling upon the prosecutors of a writ de contumacè capiendo, to show cause why it should not be quashed for irregularity, with costs. This writ had issued upon a significavit from the Arches Court of Canterbury, in a cause of *Bodenham v. Ricketts*. The defendant was not in custody(a), and this rule was obtained before the return-day. The form of the writ was as follows:—

“ Of Easter Term, in the 6th year of the reign of King *William* the Fourth.

“ Herefordshire. Our lord the king hath sent to the sheriff of Herefordshire his writ closed in these words; that is to say, *William* the Fourth, by the grace of God, &c. To the sberiff of Herefordshire greeting. Sir *John Nicholl*, knight, doctor of laws, official principal of the Arches Court of Canterbury, lawfully constituted, hath signified to us that one *Thomas Bourke Ricketts*, Esq. of the parish of Presteign, in the county of Radnor, is manifestly contumacious, and contemns the jurisdiction and authority of the law and jurisdiction ecclesiastical, in not obeying the lawful commands of the said Sir *John Nicholl*, knight, the judge of the said Court lawfully authorized, contained in a certain monition duly issued under the seal of the said Arches Court of Canterbury, bearing date, &c. and which was personally served upon the said *Thomas Bourke Ricketts* the 15th day of July following, and returned to the said Court with a certificate of the due execution thereof, and an affidavit as to the truth of such certificate; whereby the said *Thomas Bourke Ricketts* was monished peremptorily and personally to pay, or cause to be paid, to *John Bodenham*, R. L., J. A., P. and W. H., or to their proctor, the sum of 55*l.* 15*s.* 4*d.*, at which sum the costs incurred in the said Arches Court, on the part and behalf of the said *John Bodenham*, &c. were taxed and moderated, together with the expense of the said monition, on a day and hour now long passed, under pain of the law and consent thereof, and which said monition issued in a certain cause or business of appeal and complaint of nullity lately depending before the said Sir *John Nicholl*, knight, the judge aforesaid, between the said *Thomas Bourke Ricketts*, the party appellant and complainant in the said cause, on the one part, and the said *John Bodenham*, &c. on the other part; and which in the first instance thereof was a cause of

(a) See *Rex v. Hewitt*, post, 689.

subtraction of church rate or church rates, promoted and brought by the said *John Bodenham*, &c. against the said *Thomas Bourke Ricketts*, in the Episcopal and Consistory Court of Hereford; nor will he submit to the ecclesiastical jurisdiction. But forasmuch as the royal power ought not to be wanting to enforce such jurisdiction, we command you that you attach the said *Thomas Bourke Ricketts* by his body, until he shall have made satisfaction for the contempt. And how you shall execute this our precept, notify to us on, &c. wheresoever we shall then be in England, and in nowise omit this; and have you there this writ. Witness ourselves at Westminster, the &c. And be it known that the said writ, on Monday the 9th day of May, in the same term, before our said lord the king at Westminster, was delivered of record to the sheriff of Herefordshire, to be executed in due form of law" (a).

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 The KING
 &c.
 RICKETTS.

The objections made to this writ were, first, that it was not in the form prescribed by the 53 *Geo. 3*, c. 127, being directed to the sheriff of Herefordshire, instead of the sheriff of Radnorshire, of which county the defendant was described to be; secondly, that it did not appear on the face of the writ, that the Ecclesiastical Court had any jurisdiction, as the writ did not state that the church-rate in dispute was above 10*l.*; thirdly, that the writ proceeded on the commands of the official principal of the Court of Arches having been disobeyed, whereas the defendant, under the act giving an appeal from the sentence of a bishop to the archbishop, was only bound to obey the commands of the official principal of the Archbishop of Canterbury (b), and although these two offices happen to be united in the

(a) The following is the form of the writ *de contumacè* given in the schedule to 53 *Geo. 3*, c. 127:

"George, &c. To the sheriff of _____, greeting.

"The _____ hath signified to us that _____, of _____, in your county of _____, is manifestly contumacious, and contemns the jurisdiction and authority of [here fully state the non-appearance, disobedience, together with the commands disobeyed, or the contempt in the face of the Court, as the case may be,] nor will he submit

to the ecclesiastical jurisdiction; but forasmuch as the royal power ought not to be wanting to enforce such jurisdiction, We command you that you attach the said _____ by his body, until he shall have made satisfaction for the said contempt; and how you shall execute this our precept, notify unto _____, and in nowise omit this, and have you there this writ. Witness ourself at Westminster, the _____ day of _____, in the _____ year of our reign."

(b) 24 *Hen. 8*, c. 12.

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same person, that is accidental, and cannot supply the patent want of jurisdiction. 3 Black. Com. 64, was cited to show that Sir J. Nicholl was only entitled to hear appeals as official principal of the Archbishop of Canterbury, and that as official principal of the Court of Arches he had no jurisdiction. Sir J. Campbell, *contrà*, cited *Oughton Judiciorum Ord.* 8, Burn's Ecc. Law, tit. Arches, and 1 *Haggard R.* p. 48, to shew that the judge signifying was correctly described, which at last seemed to be admitted.

Sir J. Campbell A. G. now shewed cause (a). A previous application has already been made to this Court in Hilary term, 1835, and the report of the motion in 1 *Harr. & Woll.* 64, gives the history of all that has been done on these proceedings. The writ now moved to be quashed is the same as was moved on then. All the objections made to the writ appear on the face of it, and it is too late to come to the Court now. There are no affidavits in this case to show that the writ is void *ab initio*, as in *Rex v. Blake* (b).

As to the first point; it is not necessary, in filling up the blank of a *capias* according to the form given in the Uniformity of Process Act, "A. B. of —," to insert the county of the sheriff to whom the writ is directed; *Rolfé v. Swann* (c). Suppose this defendant had been in the county of Middlesex at the time the writ issued, directly he went into the county of Hereford, the sheriff of that county would have authority to take him. The forms in the schedule appended to the act were given only *pro exemplo*; if they were absolutely binding, no one but a bishop could certify contumacy, for there is no form of certificate by any one except a bishop.

Sir F. Pollock and J. W. Smith *contrà*. If this is the

(a) Before Lord Denman C.J.,
 Patteson, and Coleridge Js.

(b) 2 B. & Ad. 139.

(c) 1 M. & W. 305.

same writ which was before moved to be quashed, it is still open to the defendant, in favour of liberty, to take advantage of any defects he may discover afterwards, and therein the case differs from a question of property, where a decision binds the rights of parties for ever. But in fact it is not the same writ, nor is the matter *res judicata*. On the first point, the 53 *Geo. 3*, c. 127, directs that the writ shall be in the form in the schedule annexed. By the form given in that schedule, the writ commands the sheriff "to take — of *your* county." In this writ the sheriff of Herefordshire is commanded to take *Thomas Bourke Ricketts*, of the county of Radnor. If this is a variance in a matter of form only, still it is fatal. For the same question arose on the Uniformity of Process Act, in *Hannah v. Wyman* (a), where *Parke B.* laid down the rule as follows:—"Where there is an express enactment that a particular form shall be adopted, a deviation from that form has been held to be fatal."

The same rule was laid down by Lord *Kenyon* on a conviction in *Rex v. Jeffries* (b), who said, "If any particular form had been prescribed (by the statute) as indispensably necessary, it must have been strictly complied with." *Goss v. Jackson* (c) is a *nisi prius* decision to the same effect. So in *Davison v. Gill* (d), which was a decision on the 13 *Geo. 3*, c. 78, Lord *Kenyon* held that the words in the act, "the forms of the proceedings set forth in the schedule annexed *shall* be used," were peremptory, and he distinguished between the effect of "*shall*" and "*shall and may*." This Court came to the same conclusion in two recent cases, *Rex v. Milverton* (e) and *Rex v. Justices of Middlesex* (f). But it is not only an objection of form, for it is quite necessary that the sheriff should be limited to captures within his own county, as there are no terms to limit him to his own bailiwick, as in a *capias*; whereas under a writ like this, if it should be allowed, a sheriff of Kent might be

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(a) 3 Dowl. P. C. 673; 2 C. M. & R. 239.

(b) 4 T. R. 767.

(c) 3 Esp. 198.

(d) 1 East, 64.

(e) 1 Nev. & Per. 179.

(f) 1 Nev. & Per. 92.

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directed to take into custody an inhabitant of Norfolk, and it is not obvious what answer he could make for not executing the writ. In *Yardley v. Jones* (a), the expression of such a place, was construed to mean "*who resides at.*" Coleridge J. there said, "Can ingenuity suggest any difference between '*A. B. of —,*' and '*A. B. who resides at —.*' I can see none."

The arguments on the other points are omitted, as the Court expressed no opinion on them.

Cur. adv. vult.

LORD DENMAN C. J., on a subsequent day in this term, delivered the judgment of the Court. This was a writ de contumacè capiendo on the significavit of Sir *John Nicholl*. Several objections were taken to the writ, on which a rule nisi was obtained to quash it. As we are of opinion that one of those objections is fatal, it is not necessary to notice the others. The writ was directed to the sheriff of Herefordshire, and it recites a significavit that *Thomas Bourke Ricketts*, of Presteign in the county of Radnor, is contumacious, and commands the sheriff to attach him by his body. The form of the writ given in the schedule to the statute 53 *Geo. 3*, c. 127, and which writ is directed by the statute to be in that form, is "To the sheriff of , greeting. The hath signified to us that of in your county of , is manifestly contumacious," &c. The form of the significavit is given in the same schedule, and notifies "That one of in the county of , hath been pronounced contumacious, &c." It is plain, therefore, that the statute intends that the writ should be directed to the sheriff of that county of which the party is described to be in the significavit; that in the present case would be the sheriff of Radnorshire, and it is the more necessary that the form should in this respect be adhered to, because neither in the form given by the schedule, nor in the actual writ in this case, are the words

(a) 4 Dowl. P. C. 45.

“ if he shall be found in your bailiwick,” or any equivalent words to be found, except the words “ in your county,” which are in the form given by the schedule, but which are different in this writ. On this ground we think that the writ must be quashed.

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Rule absolute (a).

(a) See the following cases, *Rex v. Ricketts*, and *Rex v. Hewitt*.

—◆—

The KING, on the Prosecution of BODENHAM and others,
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IN this case also a rule had been obtained to quash a second writ de contumacè capiendo against the same defendant, who was not in custody (a), upon a significavit from the High Court of Delegates. The form of the writ was as follows :—

“ Of Easter Term in the sixth year of King William the Fourth.

“ Herefordshire : Our lord the king hath sent to the sheriff of Herefordshire his writ, &c. William the Fourth, &c. To the sheriff of Herefordshire greeting. John Daubeny and Thomas Blake respectively, Doctors of Laws, judges amongst others delegate respectively appointed under a certain commission under the great seal of Great Britain, bearing date the 2d day of June, in the year of our Lord 1832, have signified to us that one Thomas Bourke Ricketts, of the parish of Presteign, in your county of Hereford, Esq. is manifestly contumacious, and contemns the jurisdiction and authority of the law and jurisdiction ecclesiastical in not obeying the lawful commands (to pay or cause to be paid to John Bodenham, R. L., J. A. P., and W. H., or to their proctor, the sum of 213*l.* 16*s.* being the amount of costs on their behalf duly taxed, pursuant to a monition duly issued under seal of our High Court of Delegates, and duly and personally served on him the said Thomas Bourke Ricketts, Esq., and returned to our said High Court of Delegates, with certificate and affidavit of the execution thereof,) of the said John Daubeny and of Joseph Philimore and of the said Thomas Blake, doctors of laws, judges delegate (amongst others) respectively appointed under the said commission, and lawfully authorized, by not paying or cause to be paid to the said John Bodenham, &c. or to their proctor, the said sum of 213*l.* 16*s.*, according to the tenor of the said monition, on a day and hour now long past, in a certain cause or business of appeal and complaint of nullity from the

A writ de contumacè capiendo, reciting a significavit by two judges, of disobedience to the commands of three judges, is bad, and the Court will quash it on motion.

(a) See *Rex v. Hewitt*, post, 689.

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Arches Court of Canterbury, promoted and brought by the said *Thomas Bourke Ricketts*, Esq., the party appellant and complainant, on the one part, and the said *John Bodenham*, &c., the parties appellate and complained of, on the other part, and which was originally and in the first instance a certain cause of subtraction of church-rates, depending in the Consistorial Court of Hereford, promoted and brought by the said *John Bodenham*, &c. churchwardens of the said parish of Presteign, in the counties of Radnor and Hereford, diocese of Hereford, and province of Canterbury, against the said *Thomas Bourke Ricketts*, Esq., a parishioner and inhabitant of the said parish. Nor will he submit to the ecclesiastical jurisdiction. But forasmuch as, &c. We command you, &c."

The objections made to this writ were, 1st, that it did not appear on the face of the writ that the church-rate in question was one over which the Ecclesiastical Court had jurisdiction; 2d, that the significavit did not shew that the judges delegate, *Dr. Daubeny*, *Dr. Phillimore*, and *Dr. Blake*, were delegates in this cause at all; 3d, that admitting them to be so, it did not appear that they had had authority to make the commands therein stated, without the concurrence of the other judges delegate; 3d, that the writ stated that the appeal to the delegates was from the Arches Court of Canterbury, whereas the 29 *Hen. 8*, c. 12, s. 7, gives no appeal from that Court to the delegates, but to the archbishop only.

Sir J. Campbell now shewed cause (a). The significavit is made in this case by two doctors, the contempt is in not obeying the monition issued under the seal of the High Court of Delegates, to pay costs according to the commands of three doctors, judges delegate. But it does not appear on the face of the writ, that these doctors had not the power to make the significavit. If it is contended that they had not that power, that should have been shewn, as in *Rex v. Blake* (b), in which case there was a quorum clause which was brought before the notice of the Court by affidavit. The delegates are appointed under the 4th section of 25 *Hen. 8*, c. 19. No particular number is required.

(a) May 27th, before Lord Denman C. J., *Littledale*, *Patteson*, and *Coleridge* Js.
 (b) 2 B. & Ad. 139.

The king may appoint whoever he pleases. Is it not possible that a commission appointed under that section might authorize monitions to be made as in the present case? and if so, the Court is bound to make every intendment in favour of the writ.

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Sir *F. Pollock* and *J. W. Smith*, *contrà*. It does not appear upon this writ that the doctors, who have signified, were delegates in this cause at all. They are called delegates, but that may mean delegates in some other cause. In *Rex v. Blake* (*a*), a doctor, who was a delegate in another cause, signified improperly in that: the same error may exist here. At all events, it is not shewn that there was any clause in the commission which authorized two delegates to act at all without the rest. If there was no quorum clause, two could not give sentence, monish, or signify. Commissioners differ from a Court existing at the common law. When there is a Court by common law, it is not necessary that any particular number of its judges should concur in a particular decision, whereas commissioners, unless there be a quorum clause in their commission, must all intervene. In Lord Coke's *Second Institute*, p. 380, in the reading on the stat. West. 2, it is said, "an account taken by one auditor is not within the purview of this statute, for this act is in the nature of a commission, and a commission made to two or more cannot be executed by one alone." So in *Dyer*, 62, it is laid down, "If three be named attornies to make livery conjunctim et separatim, two cannot do it without the third;" and a similar doctrine is to be found in *Co. Litt.* 112 *b*. The delegates, therefore, should all have acted, unless the Court will presume a quorum clause. But the Court will presume nothing in favour of a writ de contumacè capiendo, but every thing against it. *Regina v. Hill* (*b*), and the authorities collected in *Com. Dig.* Excommengement, (B 4,) shew that this writ

(*a*) 2 B. & Ad. 139.

(*b*) 1 Salk. 294.

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is construed in the strictest manner. [*Coleridge J.* In *Rex v. Eyre* (a), Lord *Talbot* says, "we are not to lend the Ecclesiastical Courts our assistance but where it appears clearly that they have jurisdiction."] That doctrine is cited with approbation by Lord *Tenterden* in *Rex v. Dugger* (b). But even if the Court were willing to presume every thing in favour of the writ, no presumption could in this case make it good, for the words of 53 *Geo.* 3, c. 127, are express, that the judge or judges whose lawful commands have been disobeyed, shall signify. Here the commands of Doctors *Daubeney*, *Phillimore*, and *Blake*, have been disobeyed. And Doctors *Daubeney* and *Blake* alone have signified. They ought all three to have signified.

Cur. adv. vult.

May 5th.

Lord DENMAN C. J., on a subsequent day in this term, delivered the judgment of the Court:—

This writ, against the same party as in the last case, is on a *significavit* by two (amongst others) under a commission of delegates. Several objections also were taken in this case. It may admit of much doubt whether the first blank in the form in the schedule is properly filled up, so as to shew that there was any commission of delegates at all; but the next objection, namely, that the *significavit* is by *two*, notifying a disobedience of the lawful order of *three*, is clearly fatal. The stat. 53 *Geo.* 3, c. 127, s. 1, enacts, "that it shall be lawful for the judges or judge, whose lawful orders have not been obeyed, to pronounce the party contumacious, and to signify the same." It is clear under this enactment, that all the judges, whose orders have not been obeyed, must certify; and even if the commission authorized two to certify that the orders of three had been disobeyed (which, however, does not appear in this case one way or the other), it would be difficult to say that such authority could prevail, contrary to the words of

(a) 2 *Stra.* 1067.

(b) 5 *B. & Ald.* 791.

this statute. For this reason we are of opinion that the writ must be quashed.

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Rule absolute (a).

(a) See the form of the writ de schedule to 53 Geo. 3, c. 127, ante, contumacè capiendo given in the p. 681.

The KING v. HEWITT (b).

The same v. the same.

J. W. SMITH had obtained rules *nisi* for setting aside two writs *de contumace capiendo* issued against the defendant (who was in custody,) on significavit from the Dean of the Arches, for disobedience of monitions directing the payment of alimony. One of the writs was tested on the last day of Easter term, returnable the first day of Trinity term; the other was tested on the first day of Trinity term, and returnable upon the last day. The rules *nisi* had been obtained on the 28th of May. The objection to both writs was the same, viz. that being directed to the sheriff of Nottinghamshire, they recited significavit, describing the defendant as "James Hewitt, *now or heretofore* of the parish of Orpington, in the county of Kent."

1. A writ *de contumace capiendo* issued to the sheriff of N., reciting a significavit, in which the defendant is described as now or heretofore of a certain parish in the county of K., is bad.

2. Such a writ may be quashed on motion before the return-day; and if the defendant have been arrested on it, it is not necessary to bring him into Court by *habeas corpus*.

Sir *W. W. Follett* shewed cause. These rules were moved on the authority of *The King v. Ricketts* (c), but the wording of the writs is not precisely the same as in that case. (The Court intimated an opinion that the cases were not distinguishable.) At all events the defendant has not taken the proper course to obtain his discharge. He ought not to have moved till after the return-days of both writs. This Court has no jurisdiction over them till the return, previous to which the application should be made to the Court of Chancery, from which they issue. Secondly, he has no

(b) This case was decided in ject.

Trinity term last, but has been inserted here on account of its sub- (c) *Ante*, 680.

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right to move to quash the writs; being in custody, he ought to have sued out a *habeas corpus*, and would have been discharged on the return; that is the course which has been uniformly adopted in these cases, and which was taken in *The King v. Dugger* (a).

Sir F. Pollock and J. W. Smith, *contra*. The defendant has a right to come before the return, the writ being a record of this Court as soon as it is inrolled, which must be done before its delivery to the sheriff. In *Rex v. Ricketts* (b), the motion was made before the return-day; and in *Rex v. Blake* (c), this very objection was made and overruled. Nor is it necessary that the defendant should sue out a *habeas corpus*, in order to be relieved; that proceeding is more expensive than the present motion. And if the defendant in this case is bound to come by way of *habeas corpus*, the same rule will apply to every one in custody under an irregular *capias ad satisfaciendum* or *ad respondendum*.

(They were then stopped by the Court.)

*Per Curiam* (d).—We are all of opinion this rule must be made absolute.

Rule absolute (e).

(a) 5 B. & A. 791.

(b) *Ante*, 680.

(c) 2 B. & Ad. 139.

(d) Lord Denman C. J., *Little-  
dale, Patteson, and Coleridge Js.*

(e) In *Ex parte Strong*, 5 Dowl. P. C. 213, *Littledale J.* refused an application for a *habeas corpus* to bring up a person in the custody of the sheriff under a writ *de contumace capiendo*, assigning as a reason, that the process was that of the Court of Chancery. In that case, however, none of the numerous decisions by which writs of *habeas corpus* have been granted

under such circumstances by this Court, were submitted to his lordship's consideration. The Lord Chancellor afterwards granted a *habeas corpus*, and there seems no objection to his doing so, as the object was not to quash the writ, which it is apprehended could not have been done in that Court, it having become a record of the King's Bench. In 2 Burn's Eccl. Law, title Excommunication, 254, 8th edit. it is stated that "In *The Bishop of St. David's case*, Mich. 1 Ann. it was declared, that before 5 Eliz. cap. 23, the writ was re-

turnable into Chancery, and there by this statute, is devolved on the the significavit was quashed if undue, but now the judgment of that, Court of King's Bench."

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HEWITT,

**The KING v. The BIRMINGHAM and STAFFORDSHIRE  
GAS LIGHT COMPANY.**

*Saturday,  
April 29th.*

**UPON** an appeal against a survey and valuation made by the guardians of the poor of the parish of Birmingham, and the churchwardens and overseers of the poor of the said parish, of all houses, lands, &c. within the said parish, and the annual value thereof, for the purpose of making a rate for the relief of the poor, the sessions confirmed the same, subject to the following case :

By an act of the 1 and 2 Will. 4, c. lxvii. intituled, "An Act for the better regulating the Poor within the Parish of Birmingham," certain persons were constituted a corporation, by the name of "The Guardians of the Poor of the Parish of Birmingham;" and it was enacted, that such guardians, the churchwardens and overseers, should from time to time cause a survey and valuation to be made of all houses, lands, tenements, and hereditaments within the said parish, and of the annual value thereof; and that the sum inserted in the said survey and valuation, as the annual value of all houses, &c., should be taken to be such annual value for all the purposes of the act; and all rates made by

By a local act the guardians of the poor of the parish of B. were directed to value all houses, lands, tenements, and hereditaments within the said parish, for the purpose of rating to the relief of the poor. By the customary mode of rating under this act, fixed machinery erected for the purposes of manufacture, was not rated, nor were buildings containing it rated according to their value as increased by that machinery. A gas company supplying the town of B. with gas, but having their gas manufactory out of the parish, were rated "for their gasholders and premises in O. street, and mains and pipes within the parish of B." The company had no property in the soil of the streets under which their mains and pipes were laid, but a mere licence from the commissioners for paving and lighting the town, in whom that property was vested. The gasholder was valued, for the purpose of the rate, as a warehouse or building, at what it was worth to let by the year. The mains and pipes, and the land they occupy, were valued by ascertaining the quantity of land through which they are laid, and valuing that land with reference to the value of the adjoining lands, taking into consideration the purpose for which it was used. The mains and pipes were also valued separately, at an annual rental to let, in the same manner as houses, with an allowance for wear and tear.

Held, that such a rate is bad for inequality, on the ground of omission to rate other property of a similar nature.

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the churchwardens and overseers for the relief of the poor, should be made upon a fair and equal pound rate of all the lands, tenements, and hereditaments inserted in such valuation. An appeal was given by the same act against such survey and valuation, or any rate made under it, or any order or conviction in pursuance of the act, to the quarter sessions, within four months next after such survey, rate, or order, &c. appealed against.

In December, 1833, a survey or valuation was made pursuant to this act, in which the property of the Birmingham and Staffordshire Gas Light Company is thus described and valued :

|                                                 |                                                                                                             |                                  |
|-------------------------------------------------|-------------------------------------------------------------------------------------------------------------|----------------------------------|
| Birmingham and<br>Staffordshire<br>Gas Company. | { On their gasholders and pre-<br>mises in Oxford Street, and<br>mains and pipes within the<br>said parish. | { Annual value.<br>£2430 Os. Od. |
|-------------------------------------------------|-------------------------------------------------------------------------------------------------------------|----------------------------------|

The appellants were incorporated by an act of parliament passed in 6 *Geo.* 4, c. lxxix. By that act they were empowered to contract with the commissioners for lighting and paving the town (under the Birmingham Street Act, 52 *Geo.* 3.) and with their consent to make retorts and gasometers &c., and to sink and lay pipes &c., and for that purpose to break up the soil and pavements of streets &c. for the conveyance of gas to the houses &c. of the consumers. In pursuance of this act the appellants laid mains and pipes under the town of Birmingham. The whole of their gas is manufactured out of the town, in the parish of West Bromwich, and conveyed into the parish of Birmingham by mains and pipeways. The appellants have no property in the land of the streets under which their mains &c. are laid, but a mere licence to lay them, from the commissioners for paving and lighting aforesaid, in whom the soil is vested. The annual value of the appellants' gasholders and premises in Oxford Street was ascertained on the following principle :—The buildings and land in Oxford Street were valued in the same manner as other land and buildings in the parish, at what they were worth to let by the year. The gasholder, which contains the gas when made, formed of brick and iron-work, sunk several feet

below the ground, and raised several feet above the surface, was valued as a warehouse or building, at what it was worth to let by the year. The mains and pipes, and the land which they occupy, were valued by ascertaining the quantity of land through which they were laid, and then valuing that land with reference to the value of the adjoining lands, taking into consideration the purpose for which it is used: the mains and pipes were separately valued at an annual rental to let, in the same manner as houses, with allowance of 20 per cent. for wear and tear, being considered as holders or depositories from which the manufactured article is delivered to the consumers.

In the survey and valuation appealed against, pipes, steam-engines, and various other machinery for the purpose of manufacturing, affixed to the houses and premises of occupiers in Birmingham, were not valued; they were neither included in it specifically, as coming within the words "houses, lands, tenements, and hereditaments," nor were they estimated indirectly, as adding to the value of the premises to which they are affixed. The principle upon which the valuation was made, is that of excluding machinery, whether fixed or otherwise, used for the purpose of manufacturing. House and holdings were valued at what they would be worth to let by the year, with a deduction of 20 per cent. for wear and tear. If the Court of King's Bench should decide the points raised in the case in favour of the respondents, then the survey or valuation was to be confirmed; if not, to be quashed or amended by the Court, as far as the principle of the valuation should be affected.

*M. D. Hill* and *Amos*, in support of the order of sessions. The first question is, whether the Gas Company are rateable for their mains and pipes under the local act. Under the statute of *Elizabeth* it has been held, that a company of a similar constitution to the present were not only rateable, but that the mains and pipes were part and parcel of the freehold, which latter circumstance brings the case within the local act; *Rex v. Brighton Gas Company* (a). The

(a) 8 D. & R. 308; 5 B. & C. 466.

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case of *Rex v. Trustees for Paving Shrewsbury* (a), though it was a decision upon an act differently worded from the present local act, yet shews that themains and pipes of a Gas Company may not improperly be termed hereditaments, which could only be on the supposition that they went to the heir and not to the executor. If the mains and pipes, in the present case, are "hereditaments," they come within the express terms of the local act. But, secondly, if the mains of the Gas Company are rateable, does not the same rule apply to steam-engines? Are they not equally hereditaments within the words of the local act? They will not be hereditaments if they go to the executor and not to the heir. *Termes de la Ley, voce Hereditaments*. It has been expressly decided, that steam-engines belong to the executor, and not to the heir; *Lord Dudley v. Lord Warde* (b); *Lawton v. Lawton* (c). These decisions cannot be extended to the mains and pipes, because the two cases of *Rex v. Brighton Gas Company* (d), and *Rex v. Trustees for Paving Shrewsbury* (e), shew that they go to the heir. And the Courts, in decisions upon the law of fixtures, a law of modern and most irregular origin, adhere very closely to the circumstances of the decided cases; it would be sufficient, therefore, to say that there is authority for fire-engines belonging to the executor, none for mains and gas-pipes. But there is a distinction between the two species of property. The steam-engines are used in manufacturing produce; the mains and pipes are for the purpose of containing produce when manufactured: and moreover, the only use made by the company of the land is for their mains and pipes; it is not so as regards the steam-engines. An argument will be raised by the appellants from the decisions on the statute of *Elizabeth*, under which statute, property as slightly, and even more slightly, attached to the freehold than the steam-engines, has been adjudged rateable. There are three decisions upon the statute of *Elizabeth* to this effect: *Rex v. St. Nicholas, Gloucester* (f), *Rex v. Hogg* (g), and *Rex v.*

(a) 3 B. &amp; Ad. 216.

(e) 3 B. &amp; Ad. 216.

(b) 1 Ambl. 112.

(f) Caldecott, 262.

(c) 3 Atk. 13.

(g) 1 T. R. 721.

(d) 8 D. &amp; R. 308; 5 B. &amp; C. 466.

*Lord Granville* (a). Now, by referring to the judgment of Mr. Justice *Buller* in *Rex v. Hogg*, it will appear that the two first cases have no bearing on the present subject, because they were determined, not by reference to the words "lands and houses" in the statute of *Elizabeth*, but upon the other words of that statute, which make personal property rateable; they were determined upon provisions of the statute of *Elizabeth*, with regard to the rating of personal property, which are expressly excluded by the local act now under consideration. In *Rex v. Lord Granville* (a), the cases which shew that fire-engines are personal property, were never alluded to; it was never noticed that the fire-engines would have been liable to seizure under a *feri facias* against the freehold, which writ contains the words "goods and chattels." The case of *Rex v. Inhabitants of St. Dunstan* (b) is an express authority that the criterion for determining whether fixtures are parcel of a house or not, depends on the point whether they belong to the heir or executor. But if this were otherwise, the case is to be determined by the local act, and not by the statute of *Elizabeth*. And the local act confines the rating to "hereditaments," and limits the making of a new valuation to the period of seven years, thereby indicating that such temporary erections, as engines and other moveable fixtures, were not intended to be included.

Sir *W. W. Follett*, with whom was *Waddington*, contra. If the criterion of rating fixed machinery is assumed to be, whether they would pass to the heir or the executor, gas-holders and mains are certainly exempt from rating altogether; for they would pass to the executor. [*Patteson J.* I do not understand how any thing erected by the owner of the soil, and fixed in the soil, could go to the executor.] These are not erections by the owner of the soil; they are placed for the purpose of enjoying an easement through the soil of another. But the main point is, that if they

(a) 4 Mann. & R. 171; 9 B. & C. 188. (b) 7 D. & R. 178; 4 B. & C. 686.

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are rateable, fixed machinery erected in buildings for the purpose of manufacture must be equally so; which is a fatal objection to the present valuation. The company are first rated for the houses and land to which the gasholder is attached; then for the gasholder separately; then for the pipes separately; that is, for the full improved value of the land, taking the profits of their manufacture into consideration. That is not the mode adopted with respect to other occupiers; the additional value, derived from steam-engines and other fixed machinery attached to the freehold, is not rated by common consent. *Rex v. Lord Granville* (a) is directly to the point that fixed engines are rateable. *Rex v. The Proprietors of the Liverpool Exchange* (b), shews that the advantage attendant upon a building, either in respect of its situation or the mode of its occupation, are to be taken into account in estimating its rateable annual value. *Rex v. Bradford* (c), *Rex v. Hogg* (d), *Rex v. St. Nicholas, Gloucester* (e).

(Here he was stopped by the Court.)

**LORD DENMAN C. J.**—The rate is bad by reason of the omission to rate other property, which ought to have been included. It appears that buildings containing fixed machinery are not rated at Birmingham according to their increased value. It is clear upon the cases, that such value should have been included. It is impossible, however, for this Court to amend the survey appealed against, by inserting a new principle of valuation. We must send back the rate, made on this survey and valuation, to the sessions to quash or amend at their discretion.

**LITTLEDALE, PATTESON, and COLERIDGE Js.** concurred.

Survey and rate sent back to sessions to  
 amend or quash.

- |                                     |                     |
|-------------------------------------|---------------------|
| (a) 4 Man. & R. 171; 9 B. & C. 188. | (c) 4 M. & S. 317.  |
| (b) 3 N. & M. 550; 1 Ad. & E. 465.  | (d) 1 T. R. 721.    |
|                                     | (e) Caldecott; 262. |

1837.

Wednesday,  
May 3d.

## LAW and another v. WILKINS.

**ASSUMPSIT** for goods sold. Plea, non assumpsit. At the trial at the Cambridgeshire Summer Assizes, 1835, before *Parke B.*, it appeared that the action was brought to recover the sum of 3*l.* 11*s.*, the price of a suit of clothes furnished by the plaintiffs, who were tailors, to the defendant's son, who was a boy at school at Cambridge. It appeared by the evidence that the boy, who was the son of an attorney near Cambridge, was in need of clothes, and that the plaintiffs made a suit for him; but it did not appear who gave the order. He went home to his father for the holidays, with the suit upon his back, and returned to school with them when the holidays were over. Upon this evidence the learned baron thought, on the authority of *Blackburn v. Mackey* (a), that there was nothing to charge the defendant with having authorized the purchase of the clothes, and he directed a nonsuit.

*Kelly* having obtained a rule to set aside the nonsuit, and for a new trial, on the authority of *Baker v. Keen* (b), cause was now shewn against it by

*Storks Serjt.* There is no ground here to disturb the nonsuit, for the plaintiffs' counsel did not insist on the evidence being left to the jury. [Lord *Denman C.J.* That is not necessary, if a judge thinks fit to nonsuit, counsel are not bound to insist on the case going to the jury.] There is no evidence in this case that the defendant knew any thing of the clothes having been furnished to his son. There was nothing to shew that the father had not supplied him with all necessaries required. A boy does not take to school with him an implied authority to bind his father for clothes. It is true that it is in evidence the boy was in need of clothes, but that may be said of almost all boys at school, however well supplied they may be. [Lord *Denman*

1. Where a father has seen his son (a boy of 14), wearing a suit of clothes, it is a question for the jury whether he authorized the purchase of them.

2. Counsel need not insist on the case being left to the jury, if the judge think fit to nonsuit.

(a) 1 C. &amp; P. 1.

(b) 2 Stark. 501.

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C.J. There is a case of *Rolfe v. Abbott* (a), in which it is laid down, that to charge the father, it is essential that the goods should have been supplied with his assent, or by his authority. Does not that shew that the case should have been left to the jury, for them to say whether they would imply that the father had made a contract ?] No objection is made to the case being left to the jury, but the rule is, that to bind the father, there must either be an express authority, or so strong an implied authority as to be equivalent.

*Kelly* contra was not called upon by the Court.

LORD DENMAN C.J.—I think that the learned baron went farther than is warranted by any of the cases in non-suiting the plaintiffs. It is reasonable that the father should be bound for all the contracts for necessities entered into by his son. In this case the defendant is an attorney, living a short distance from Cambridge. He does not shew that he had authorized any person to supply the lad with the clothes that he might want, and it is proved that he was in need of them. Under these circumstances I do not see any thing to dispense with the defendant giving evidence to shew that the boy was well supplied with those necessities. If the boy had been sent from home to earn his living, it might have been different.

LITTTLEDALE J. concurred.

PATTESON J.—I think that there was *some* evidence in this case to leave to a jury, though perhaps not a strong case. In order to raise the presumption that the father knew nothing at all of the boy's having these clothes, it must be supposed that upon his going home for the holidays, he locked them up in a box during the whole time, which is absurd. On the other hand, if the father saw the

boy wearing the clothes, that gives rise to the inference that he authorized the order of them.

1837.



LAW  
v.  
WILKINS.

COLERIDGE J. concurred.

Rule absolute.

DAVIS v. CHAPMAN.

**ACTION** for an escape against the Marshal of the King's Bench prison. The defendant having taken out a summons before a judge at chambers, to obtain a particular of the escape on which the plaintiff relied, Lord *Denman* C. J., upon hearing the attornies on both sides, ordered the plaintiff's attorney to deliver to the defendant's attorney, "an account in writing of the particulars of the alleged escape or escapes for which the action was brought, specifying the time and place."

*Mansell*, in this term, having obtained a rule to rescind this order of the Lord Chief Justice,

Sir *J. Campbell* A. G. now showed cause against it. The practice has always been, in actions against the marshal for an escape, to furnish a particular of the escape relied on; and nothing can be more reasonable, for if a prisoner has the benefit of the rules, his escape would not be within the knowledge of the marshal, whereas it is within the knowledge of the plaintiff. Whenever, in a case of this kind, a single judge makes an order like the present, the Court will not interfere with the exercise of his discretion. But the decision of the Court in *Webster v. Jones* (a) has ruled that in these actions a particular shall be delivered.

The Court then called upon *Mansell* to support his rule.

*Mansell* contra. Before the new rules, when the plaintiff might have declared in a number of counts for the same

(a) 7 D. & R. 774.

Friday,  
May 5th.

In actions against the Marshal of the King's Bench prison for an escape, the plaintiff is bound to give a particular of the escape relied upon, and the judge's order for a particular should require the precise day of the escape to be stated, which the plaintiff must state in his particular, if it is within his knowledge.

1837.

DAVIS  
v.

CHAPMAN.

escape, it might have been reasonable to give a particular ; but now that there can be only one count for one escape, on which the plaintiff must stand or fall, the defendant does not require it, and it is a hardship on the plaintiff. Besides, this order goes further than *Webster v. Jones (a)*, as the plaintiff is called upon to give the particular day of the escape in this case. In *Webster v. Jones*, Abbott C. J. said, " You are not required to state the precise day for which you sue;" and *Holroyd J.* said, " You can give the defendant some notion of the transaction on which your action is founded."

The COURT (b).—Upon such an order as this, the plaintiff must give the best particular he can; and if he do not give information enough, the defendant must get an order for a better particular. He is bound to give such information as is in his power, and the precise day of the escape, if he is aware of it. In actions against the marshal, these orders have been frequently made, and there is no ground whatever for rescinding the present one, as it is right not only in substance, but in form also. If the plaintiff cannot give the precise day, he must comply with the order as nearly as he can.

Rule discharged, with costs.

(a) 7 D. & R. 774.

(b) Lord Denman C. J., *Little-  
dale, Patteson, and Coleridge Js.*



1837.

Friday,  
April 21st.

## CLARE v. MAYNARD.

**ACTION** on breach of warranty on the sale of a horse. The declaration averred charges and expenses in causing the horse to be examined, feeding, keeping, &c. and also that the plaintiff, before the unsoundness was discovered, sold the horse under a warranty to one *W. Collins*, for 55*l.*; that *W. Collins* returned the horse on unsoundness being discovered, and the plaintiff was afterwards obliged to repay that sum, together with 3*l.* 3*s.* for the expenses incurred by *W. Collins*, with respect to the horse, in keeping and returning him; and that the plaintiff afterwards sold the horse by auction, for 17*l.* 14*s.* 6*d.* And the plaintiff, by reason of the premises, hath lost all the benefits, profit and advantage, which he would have derived from reselling the same.

Plea, payment into Court of 39*l.* 4*s.* in satisfaction of the damages.

Replication, damages ultra.

The cause was tried at Guildhall, before Lord *Denman* C. J. The amount which the plaintiff sought to recover was compounded of the following items:—the feed and keep of the horse; law expenses incurred previous to the prosecution of the suit, in advising respecting it; the expenses of an examination by a veterinary surgeon, and his certificate; and the difference between the sum of 45*l.*, for which the plaintiff had originally bought the horse, and the sum of 55*l.*, for which he had sold it to *W. Collins*, being in fact his *profit* on the first resale. The sum of 39*l.* 2*s.*, paid into Court by the defendant, was intended to cover the expenses of keep, both by the plaintiff and *W. Collins*, the expense of service of a notice of the unsoundness, and the difference between 45*l.*, the sum which the plaintiff had paid for the horse, and 17*l.* 14*s.* 6*d.*, which he had received for it on the resale by auction, after the unsoundness was discovered, being the plaintiff's *loss* by the

1. Declaration on breach of warranty of a horse, alleged by way of special damage, that the plaintiff had resold the horse at an advanced price; that the horse had been returned to him, and that he had lost all the profit which he would have derived from the resale:—Held, that on this declaration the plaintiff could not recover the difference between the two prices, it not being averred that the increased value of the horse was owing to any outlay by him since it had been in his possession.  
2. *Qu.* If it had been so averred and proved.

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transaction. His lordship held that the plaintiff could not recover the law expenses, or those of the veterinary surgeon's certificate, and directed the jury to give damages to the amount of the difference between 17*l.* 14*s.* 6*d.* and the sum which the horse would have been worth when bought by the plaintiff, if it had been sound, which was not shewn to exceed 45*l.*, which he gave for it. The jury thought that 39*l.* 2*s.* covered the damages, and found for the defendant.

*M. D. Hill* moved for a new trial, on the ground of misdirection. The plaintiff was entitled, as part of his damages, to 10*l.*, as the difference between the sum which he gave for the horse, and the sum which he would have received if it had been sound, having actually sold it for such a sum to *W. Collins*: for this is clearly part of the loss which he has sustained by the breach of warranty. This is no claim for profit which might have been made on the horse, but for a distinct contract between the plaintiff and a second vendor, the benefit of which the plaintiff has lost.

Lord DENMAN C. J.—The declaration states, as special damage, that the plaintiff sold to *W. Collins*, at an advanced price, and was obliged to give up the bargain and take back the horse. If that had been so claimed at the trial, I should have put it to the jury, as in the case of *Cox v. Walker* (a), whether, although 45*l.* was the original price paid by the plaintiff, 55*l.* was not the real value of the horse, and consequently the true measure of damages. But that was given up, and the claim now is for the profit made by the bargain. Such a mode of claiming damage cannot be allowed.

PATTESON J.—Whether or not the plaintiff was in the situation of the purchaser of an article, who, having laid out certain expenses in order to improve that article for the purpose of resale, seeks to recover the amount of those

(a) In *K. B.* standing for judgment.

expenses as part of his loss by a breach of warranty of the article, is not the question which here arises. The claim of the plaintiff is simply for the difference between the price at which he bought and that at which he might have sold. It is not stated, nor was there any evidence, that the value of the horse was improved in the interval by money laid out by the plaintiff. The allegation in the declaration can therefore mean nothing but loss of bargain, and I think the verdict was right.

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COLERIDGE J.—It is admitted that the horse was worth 45*l*. Expenses have moreover been incurred. It was resold for 55*l*. The plaintiff claims the difference. He does not allege that the resale, at this advanced price, was the consequence of any outlay of his. He cannot recover for the mere loss of a good bargain(*a*).

Rule refused.

(*a*) See *Walker v. Moore*, 10 B. & C. 416. The plaintiff cannot recover the profit which would have accrued to him from a resale of property, if the title had been good, as it appeared by the abstract, no fraud being imputed to

the vendor. But Bayley J. said, "If there were mala fides in the vendor, but not otherwise, I am not prepared to say that the purchaser might not recover the profit which would have arisen from the resale."

### THE KING v. JUSTICES OF DERBYSHIRE.

Thursday,  
 April 27*th*.

AN appeal against an order of removal between the inhabitants of Castleton, appellants, and the inhabitants of Bradwell, respondents, was entered for trial at the Derbyshire

1. A statement of ground of appeal, alleging that the pauper has

"gained a settlement by hiring and service," in a third parish, without any farther specification, is insufficient under 4 & 5 Will. 4, c. 76, s. 81.

2. The Court of Quarter Sessions having refused to allow the appellants to enter on their case on this statement, and confirmed the order of removal on the ground of its insufficiency, a mandamus will not issue commanding them to enter continuances and hear the appeal.

3. Where there are two overseers and one churchwarden, signature of notice of appeal by the two overseers is sufficient.



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 The KING  
 v.  
 Justices of  
 DERBYSHIRE.

Midsummer General Quarter Sessions of the Peace, 1836.

When the appeal was called on, the respondents objected to its being heard, on the ground that the statement of the grounds of appeal was insufficient. The notice was in the following form :—

“ To the Overseers of the Poor of the township of Bradwell, in the county of Derby.

“ We the undersigned, overseers of the poor of the township of Castleton, in the county of Derby, do hereby give you notice, that we intend, at the next General Quarter Sessions of the Peace to be holden at Derby on the 28th day of June next, in and for the county of Derby, to try an appeal against an order, dated the 11th day of April last, made by *Broughton B. Pegge Burnell* and *J. Holworthy*, Esqrs. for the removal of *Hannah Swindells*, single woman, from the township of Bradwell to the said township of Castleton. And we hereby inform you, that the grounds of the appeal against the said order are, that the said *Hannah Swindells* gained a settlement in the parish or township of Chapel-in-le-Frith, in the said county of Derby, by hiring and service, for a year and upwards, subsequently to the settlement alleged to have been obtained by her in the said township of Castleton; and likewise that the said *Hannah Swindells* gained a settlement in the township of Bradwell aforesaid, by hiring and service for a year and upwards; and also by having served several years under a general hiring in the said township of Bradwell, after the time when it is alleged she obtained a settlement in the township of Castleton aforesaid. Dated the 11th June, 1836.


“ *Thomas Hall. Samuel Joyse.*”

*Thomas Hall* and *Samuel Joyse* were overseers of the poor: *William Tymm*, the churchwarden of the township of Castleton, did not sign the notice.

The objection taken on the part of the respondents was, that the notice ought to have stated not only the parishes or townships in which the subsequent settlements were obtained by the pauper, but also the names of the persons she lived with, and the dates or times of the hiring and service when the said settlements were gained. The Court being divided in opinion, the majority voted that the notice was insufficient, and in consequence refused to permit the appellants to enter upon their case. The Court would not enter on their record that they refused to hear the appeal; but confirmed the order, the clerk of the peace being

directed to make a special entry, which was in the following words :—"The Court confirmed the order of removal, because the grounds of appeal are not sufficiently stated in the notice of the ground of appeal."

A rule having been obtained, calling on the justices to shew cause why a mandamus should not issue commanding them to enter continuances and hear the appeal,

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*Whitehurst* now shewed cause. The notice of the grounds of appeal was bad for two reasons : first, as being only signed by the two overseers without the churchwarden ; secondly, because the grounds are insufficiently stated. The first point was not raised before the sessions ; but that will not preclude us from taking it, should the case be sent back. It will therefore be desirable that we should have the opinion of this Court on both, in order to save the parties the expense of a fresh trial, even if this Court has power to grant it. The statement of grounds is insufficient, because it alleges two different settlements by hiring and service, without specifying the name of the master, the date, or any further particulars, in either instance. The settlement in *Castleton*, on which the order of removal was founded, was obtained in the year 1816 ; a period of twenty years has therefore elapsed since, and the statement of grounds gives no information to direct the respondents to any particular portion of the whole time embraced within those limits. *Rex v. Kelvedon* (a), *Rex v. Holbeach* (b). In *Rex v. Justices of Cornwall* (c), it certainly appears to have been held, that if the grounds of an appeal alleged in a statement only are that the pauper is settled in another parish, they are sufficiently stated. But it may be observed, that it was not necessary in that case to come to so comprehensive a conclusion : the decision might have proceeded on narrower grounds. The intention of the legislature in requiring the statement of grounds of appeal was not merely, as it has

(a) 1 N. & P. 138.

(c) 1 N. & P. 144.

(b) 1 N. & P. 137.

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been represented, to put the respondent parish on an inquiry; it was to narrow, as far as practicable, the limits of that inquiry, by giving the respondent parish precise information of the character of the case intended to be set up against it. Decisions on former statutes in *pari materia* are, *Rex v. Justices of Oxfordshire (a)*, where a notice of appeal against an order of filiation was held insufficient, the cause and matter of the appeal not being set out pursuant to 49 Geo. 3, c. 68, s. 5. [*Patteson J.* In that case no cause and matter were set out at all.] *Rex v. Sheard and another (b)*, which was an appeal against overseers' accounts.


The next question is, whether the Court has the power to grant the mandamus applied for. Let us look at the course of the trial. When the appeal was called on the appellants began, the affirmative being on them, namely, to prove a later settlement than that which is admitted to have been gained in their own parish. Their counsel proposed to prove such settlement: and on this the objection was taken to their statement of grounds. The Court confirmed the order of removal, because those grounds appeared insufficient. I apprehend that in this case the Court of Quarter Sessions has therefore "heard and decided" the appeal. And unless a special case had been granted, this Court can have no authority. The mandamus can only be to enter the appeal; but the appeal has been already entered, and the order confirmed. [*Patteson J.* The statute says, the appeal shall not be heard, unless a statement of grounds be given; here you contend that an insufficient statement has been given, which is equivalent to none at all.] By the entry of the appeal and opening of the appellants' case, the appeal was properly lodged, and the Court of Quarter Sessions could then deal with it at its discretion.

*N. R. Clarke* (with whom was *Willmore*) in support of the rule. This application is for a mandamus to compel the sessions to *hear* the appeal. It is impossible to say

(a) 1 B. &amp; C. 279.

(b) 2 B. &amp; C. 854.

that it has been *heard*, when it has been dismissed on a preliminary objection. [*Patteson J.* In what manner are we to get rid of the order of sessions?] *Rex v. Justices of Hertfordshire* (a), and *Rex v. Justices of Lindsey* (b) are in point. Next as to the validity of the statement. To require extreme strictness in a statement of grounds would be obviously productive of greater inconvenience than the contrary practice. The case of *Rex v. Justices of Cornwall* is conclusive (c). *Rex v. Holbeach* (d) was decided on the ground, not that the statement of grounds was insufficient, but that something false was inserted in it; and the Lord Chief Justice said, that although that part of the statement might have been unnecessarily inserted, yet that being false, it vitiated the whole. *Rex v. Kelvedon* (e) is an authority in our favour, as far as it goes. In that case it only appeared on the examination that the pauper was certificated; and the respondents were nevertheless allowed to go into the rest of their case. As to the cases cited on former statutes, both in *Rex v. Justices of Oxfordshire* (f), and *Rex v. Sheard* (g), no grounds were set out at all in the notices to which objection was taken. (*Willmore* also cited *Rex v. Justices of Lancashire* (h).)

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*Cur. adv. vult.*

LITLEDALE J., in the following term (June 12), delivered the judgment of the Court. This case was argued in Easter term last, in the absence of my Lord *Denman*, who agrees, however, with the judgment I am about to pronounce.

The question turned upon the sufficiency of a statement of the grounds of appeal given by officers of the township of Castleton, in Derbyshire, against an order of removal from

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| (a) 1 N. & M. 331; 4 B. & Ad. 561. | (e) 1 N. & P. 138. |
| (b) 6 M. & S. 379.                 | (f) 1 B. & C. 279. |
| (c) 1 N. & P. 144.                 | (g) 2 B. & C. 856. |
| (d) 1 N. & P. 137.                 | (h) 7 B. & C. 691. |

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the township of Bradwell, in the same county. The statement alleged as the ground of appeal, that the pauper had acquired a settlement in the parish of Chapel-in-le-Frith, by hiring and service, subsequent to the settlement in Castleton, without stating the time when, or the name of the master. At the sessions the appellant proposed to give in evidence that the pauper was hired by and served a person in the parish of Chapel-in-le-Frith, since his acquiring a settlement in the appellant parish; but the Court refused to hear the evidence, considering the statement insufficient within the 81st section 4 & 5 W. 4, c. 76.

That section requires that the appellants should deliver a statement in writing of the grounds of their appeal, and provides, that on the hearing they shall not go into or give evidence of any other grounds. In this case, if the statement delivered by the appellants was in itself sufficient, they were entitled to give the evidence they tendered at the sessions, notwithstanding the proviso in the act, for it was not evidence of any other ground of appeal; it was to support, by detailed evidence, that ground which was alleged generally in their statement, viz. settlement by hiring and service in the parish or township of Chapel-in-le-Frith.

In *Rex v. Holbeach* (a), and also in *Rex v. Misterton* (b), decided in the present term, we held that the sessions ought not to have received the evidence tendered, because in those cases the statement of the grounds of appeal in the one, and the examination of the pauper in the other, were sufficient in themselves in respect of the particularity of the statement; but the evidence tendered was at variance with those statements, and when received proved another ground of appeal in the one, and removal in the other. Now, it is obvious that this statement gives no real information to the respondent parish. Without being informed of the time of service, or the name of the master, the respondents would in vain make inquiries in any populous parish as to the fact of the pauper having been hired and served in it; and it seems

(a) 1 N. & P. 137.

(b) Not yet reported.

far more convenient to require greater particularity in the statement. But we were pressed with the authority of the cases of *Rex v. Justices of Cornwall* (a), and *Rex v. Kelvedon* (b). In the former, the expressions used by the Court undoubtedly seem to sanction generality of statement. The circumstances were, however, peculiar. The order of removal related to a man and his wife, and her children by a former husband, from Penryn to St. Glauvius. The examination of the pauper and his wife, a copy of which was delivered to the appellants under the 79th section of the act, shewed that the man was settled in St. Glauvius, that the father of the children was settled in Penryn, and that they had acquired no settlement of their own. The statement of the grounds of appeal was sufficient as to the man; as to the children, it alleged merely that they were settled in Penryn—a fact which appeared upon the papers of the respondents themselves, and which was not in dispute; but it raised a point of law, namely, whether the children, by the operation of the 57th section of the act, (which makes the children part of the second husband's family, for the purposes of the act,) were removeable with the man to his place of settlement. The sessions refused to hear evidence that the father of the children was settled in Penryn. The Court held that they were wrong. Perhaps the proper course for the sessions would have been, to have taken the fact of the father's settlement as an admitted fact by both parties, and to have refused evidence either for or against it; but they were certainly wrong in excluding the fact from their consideration. The case of *Rex v. Kelvedon* (b) turned on the sufficiency of the pauper's examination, to shew the ground of removal; as to which, it was justly observed by my brother *Coleridge*, that the language of the act is different in the 79th and 81st sections, and that the act was made with different purposes as to the notices to be given by each side. Again, in that case the informa-

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(a) 1 N. &amp; P. 144.

(b) 1 N. &amp; P. 138.

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tion was given to the parish in which the pauper was alleged to be settled, and they, by their statement of the grounds of appeal, shewed that they fully understood the examination and the grounds of removal contained in it.

The clauses in this act, respecting the grounds of removal and appeal, are intended to compel such a disclosure by both parties, as will enable them to go to the sessions fully aware of the questions which are to be discussed: and we think that we best effectuate such intention by holding that the statement must not be in general terms, but must condescend to particulars, not to the extent of setting out the evidence by which facts are to be proved, but so as to give the opposite party reasonable means of inquiry. Another point was made on the argument as to the persons who signed the notice and statement. This point was not made at the sessions; but if it had, we should hold the notice and statement sufficient in that respect, according to the rule which we laid down, a few days since, in the case of *Rex v. Justices of Warwickshire* (a)

Rule discharged.

(a) Not yet reported.

Saturday,  
May 6th.

TEBBUTT v. SELBY.

In an action on the case for obstructing plaintiff in the enjoyment of an easement, the plaintiff must shew, in his

declaration, that the obstruction was in the place or thing wherein the plaintiff is entitled. Thus, when a declaration alleged a right to take water at a cistern, and complained that the defendant wrongfully locked up a door leading to it, and thereby prevented the plaintiff from using the cistern, issue having been taken on the right to take water, judgment was arrested after verdict for the plaintiff, because *non constat* that he had any right to go through the door-way in question, although the verdict found he had a right to take the water.

**ARREST** of judgment. The declaration stated, that the plaintiff, before and at the time of the committing of the grievance by the defendant, as hereinafter next mentioned, was, and from thence hitherto hath been, and still is lawfully possessed of certain rooms and apartments in and parcel of

a certain dwelling-house situate and being in the county of Middlesex, and in which said rooms and apartments he the said plaintiff then inhabited and dwelt, and still doth inhabit and dwell, with his family; and the plaintiff, during all the time aforesaid, ought to have had, and still of right ought to have for himself and his family, inhabiting and dwelling in the said rooms and apartments, at all reasonable times, the liberty and privilege of taking water from and out of a cistern situate and being in the said dwelling-house, and the use, benefit, and enjoyment of such cistern; and also the privilege of using a certain dust-hole, situate and being in the said dwelling-house, for the purpose of throwing and depositing therein such ashes, dust and dirt as might be made and accumulated in the said rooms and apartments. Yet the defendant, well-knowing the premises, but wrongfully and unjustly contriving and intending to injure the plaintiff in this behalf, and to deprive him of the use, benefit and enjoyment of the said cistern and dust-hole respectively, heretofore and whilst the plaintiff was so possessed of his said rooms and apartments as aforesaid, to wit, on the 1st day of May, 1836, and on divers other days and times between that day and the commencement of this suit, wrongfully and injuriously locked and fastened, and caused and procured to be locked and fastened up a certain door and door-way, situate and being in the said dwelling-house, and leading to the said cistern and dust-hole respectively, and kept and continued the same so locked and fastened up for a long space of time, to wit, from thence until the day of the commencement of this suit, and thereby for and during all that time continually hindered and prevented the plaintiff and his family from having access to the said cistern and dust-hole respectively, and wholly hindered and prevented the plaintiff and his said family from taking any water from the said cistern, and wholly excluded them from the use, benefit, and enjoyment of the said cistern, and also the privilege of using the said dust-hole for the purposes aforesaid; and he the said plaintiff and his family,

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by means of the said several premises, could not, during any part of the time aforesaid, obtain or procure any water from the said cistern, or have or enjoy the use and benefit of the said cistern and dust-hole, or either of them, as they of right ought to have done, and otherwise might and would have done; and he the plaintiff hath been, by means of the premises aforesaid, entirely deprived of the use, benefit and enjoyment thereof. The pleas traversed the right of using the cistern, and the right of using the dust-hole, and issue was joined upon them.

At the trial before *Coleridge J.* at the sittings after last Michaelmas term, a verdict passed for the plaintiff on both issues.

On a former day in this term *Peacock* obtained a rule to arrest judgment, on the ground that it was quite consistent with plaintiff's case, as stated on the record, that he might have access to the cistern by another way, and therefore no cause of action was shewn.

*Sir J. Campbell A. G.* and *Jervis* now shewed cause. The ground of action in this case is, preventing the plaintiff from using the cistern, and the declaration only states that it was with the view of preventing him from so doing that the defendant locked up the door. It would have been sufficient to allege the obstruction generally, and the locking up the door is only a *modus in quo*, and quite immaterial to the issue, which was on the right of using the cistern only. The defendant might have pleaded that he did not hinder the plaintiff's access, but the issue here is only on the right of taking water, and that has been found for the plaintiff. It is immaterial, therefore, in what mode the defendant made the obstruction. It is not as if the plaintiff was setting up a right of way, but the whole gist of the action is, that the defendant has obstructed plaintiff's right to take water. After verdict the intentment must be in favour of the count. The charge is not that

the defendant locked up the door, but that he locked it up and *thereby* prevented the plaintiff from having access to the cistern. It is clear, therefore, on the face of the declaration, that there was no other way to the cistern. The declaration charges also that the defendant *wrongfully* locked up the door; the defendant therefore might have traversed that by pleading not guilty, if he had chosen.

*Peacock* contra. A general allegation of obstruction to the plaintiff's right might be good after verdict; but here the plaintiff has done more, and has stated the injury to consist in locking up a certain door, and thereby preventing a use of the cistern by the plaintiff. Now, it is quite consistent with the facts stated in the declaration, that the defendant and the plaintiff might both have been lodgers in the same house, or the house might have belonged to the defendant, and the plaintiff have been a lodger in it. Suppose that the case were so, and that the plaintiff could not get to the cistern without going through the defendant's rooms, it would be no injury for the defendant to lock up the door. Suppose also a plaintiff in his count claim a right of common, and charged defendant with locking up a gate leading to the common, the declaration would be bad, for the gate might be on the defendant's premises, and it could not be intended that there was but one way to the common, or that it was a way of necessity. The proper way of stating the injury in this case, would have been to allege a right of taking water at the cistern, and a right of passing through the door in question, as appurtenant to that right. Where a rector declares for an obstruction to his way in carrying away his tithes, he must allege, that by reason of his possession of the tithes, he of right ought to have a certain way through a field of the defendant. But it would not be sufficient in a declaration to state merely that he was possessed of the tithes, and that defendant wrongfully locked up a gate and prevented him from carry-

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ing them away, without alleging that he had a right to pass through that gate (a). In this case the plaintiff ought to have alleged that he had a right to go through the door-way in question.

The distinction is pointed out in a note to *Mellor v. Spateman* (b), between the mode in which a right of common is claimed in a declaration and a plea, and that in the former a mere possessory right only need be stated. And it may be conceded that against a wrong-doer it is sufficient to say generally, that the plaintiff *habere debet* the thing demanded, *Com Dig. Pleader*, (C. 39). But here the plaintiff does not say *habere debet*; the omission of which averment, as to right of common, is fatal, even after verdict; *Blythe v. Topham* (c); and the like averment is required in an action for disturbance of a way, *Com. Dig. Action upon the Case for a Disturbance*, (B 1); or for a nuisance, *Com. Dig. Action upon the Case for a Nuisance*, (E 1), *St. John v. Moody* (d). It was said, that under the plea of not guilty, the defendant might have shewn that he had a right to lock up the gate, but that is not so, for *Frankum v. Earl of Falmouth* (e) shews, that not guilty would only have traversed the fact of the gate being locked. The way to the cistern seems to be claimed as a sort of way of necessity. But it does not follow that the plaintiff would have a right of way of necessity through the door-way, even if he could not get to the cistern by any other way. A right of way of necessity is a right by implied grant or reservation, and therefore in a plea the origin of such a right ought to be shewn, though in a declaration the allegation of *habere debet* would be sufficient; and the plaintiff, under that allegation, might prove any circumstances under which the law would give him a right of way of necessity; *Pomfret v. Ricroft* (f).

(a) See *Cobb v. Selby*, 2 N. R. 466; *James v. Dodd*, 2 C. & M. 266.

(b) 1 Wms. Saund. 346, n.(2).

(c) Cro. Jac. 148.

(d) 2 Lev. 148; 1 Vent. 274.

(e) 4 N. & M. 330; 2 A. & E. 452.

(f) 1 Wms. Saund. 323, n.(6).

This defect, therefore, existing in the declaration, the question is, whether it is cured by verdict, either by the common law or the statutes of jeofails, and it clearly is not. A verdict at common law only supplies that which must necessarily have been proved in order to support the finding of the jury (*a*). Here, the only issue was, whether the plaintiff had the right to use the cistern, and the learned judge could not have directed the jury to consider the point as to the right of way at all. Neither is it cured by pleading over, or by any of the statutes of jeofails, for it is a defect in substance, that goes to the plaintiff's whole cause of action; *Dr. Bonham's case* (*b*), *Ward v. Honeywood* (*c*). The defect, if cured by the statutes of jeofails, would have been cured by judgment by default, for by the 4 & 5 Ann. c. 16, s. 2, all the statutes of jeofails are extended to judgments by default. It has been held that a judgment by default cures form only; and in *Collins v. Gibbs* (*d*), Lord Mansfield C. J. pointed out, that an objection after judgment by default, comes exactly as if made on general demurrer. Now the gist of the action consists in the plaintiff's right to go through the door-way in question; if therefore he shews no title, his action falls to the ground. In *Hooker v. Nye* (*e*), it was held, that a replication *de injuriâ* to a plea claiming an interest in land, was bad on general demurrer, and that is not nearly so strong a case as the present. In *Avery v. Hoole* (*f*), Lord Mansfield C. J. held, that "a verdict will not mend the matter, where the gist of the action is not laid in the declaration." [*Patterson J.* Is not the allegation of the defendant's having locked up a door leading to the cistern, an informal allegation, that that is the way through which the plaintiff had a right, to go, and therefore cured by the statutes of jeofails, as in

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(*a*) See *Com. Dig.* Pleader, (C. 86), and note (1) to *Stennel v. Hogg*, 1 Wms. Saund. 227.

(*b*) 8 Rep. 120 a.

(*c*) 1 Dougl. 61.

(*d*) 2 Burr. 899.

(*e*) 1 Cr. M. & R. 258.

(*f*) 2 Cowp. 825.

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the case of *Corbyson v. Pearson* (a), where the plaintiff, in an action of trespass against the lord, for impounding his beasts, prescribed for a right of common for his cattle levant and couchant, and justified putting in his beasts, (without saying levant and couchant,) *utendo predicta communia sua*, and it was held that these words contained the allegation that the beasts were commonable. That decision has been sometimes misunderstood, as being a defect cured by verdict; but it is not so, it was a defect cured by the statutes of jeofails.] *Corbyson v. Pearson* (a) is not a parallel case; if it had stated that the plaintiff had a right of common, and that the defendant obstructed his way to it, it would have been in point; but there the plaintiff's right was properly stated, the defect was in an imperfect averment of the user of it. The gist of the action here is not in the plaintiff's right to the cistern, but in locking up the door leading to it. Consistently with the plaintiff's charge, the door might be one of two doors leading to the cistern, or it might be only one, and yet the plaintiff might have no right to go through it; for suppose there had been two originally, and the grantor of one of them to the plaintiff had stopped it up, the plaintiff would have no right to go through another on the defendant's premises.

Lord DENMAN C. J.—This is not an application to arrest judgment after verdict, but to arrest it as if it were after judgment by default, for there was no verdict given on this point. We therefore cannot import into the case any presumption of what the plaintiff might have proved in support of his right at the trial, but must consider the objection as if it arose upon general demurrer. Suppose the declaration had stated in general terms that the defendant obstructed and hindered the plaintiff from getting water at his cistern, it might be a grave question whether it would be good on general demurrer or not. Instead, however, of

(a) Cro. Eliz. 458.

framing his declaration thus, the plaintiff avers that the defendant wrongfully locked up a certain door and door-way, and thereby hindered and prevented the plaintiff from having access to the cistern. The plaintiff therefore states the mode in which the injury complained of is created, and undoubtedly makes that mode material. It is said that the obstructing the plaintiff in getting the water is the material part of the issue, but I do not think that is so, for the cistern might have been in the plaintiff's own rooms. I certainly think the allegation as to the door and door-way, must be taken to shew that the plaintiff could not get to his cistern without going through them; but that being so, the plaintiff ought to have averred that he had a right to go through.


LITLEDALE J.—In a case of this kind, the word “obstructed” would have been sufficient to support the plaintiff's cause of action after verdict, but here, the only issue joined was, as to the right to use the cistern and dust-hole.

The other charge the defendant has pleaded over to, and it stands now upon this record, as if he had suffered judgment to go by default. The question therefore is, whether the allegation that the defendant locked up the door, and thereby prevented the plaintiff from having access to the cistern, necessarily imports that the plaintiff had a right to go through that door. I do not think it does, but that he ought to have averred that he had such a right.

PATTESON J.—Either this is the claim of a right to use water at the cistern, without saying how the cistern is to be got at, or it is a charge of an obstruction to a way which the plaintiff has a right to use. If viewed in the first light, it is like the case put of a right of common, where if a commoner charge another with having locked up the way leading to his common, the action would not lie, for it does not follow that there is no other way to the common. In all cases for disturbance of a way, the obstruction ought

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to be charged on the pleadings in the thing itself to which the party has a right, and if charged generally, the declaration would be bad. Much more then, when the mode of the obstruction is stated, and that not in the thing where the right is claimed.

Secondly, suppose the declaration complains of a blocking up the way to the cistern, still it does not state that the plaintiff had any right to go that way, which ought to have been asserted. It struck me during the argument, that the words in the declaration, "door leading to the said cistern," might involve an assertion that the door was in the proper way for the plaintiff to go, and that therefore it was an informal allegation, cured by the statutes of jeofails (a). But it is not, for it may well be that the plaintiff had a right to the water, but no right to go through that particular door. It was said, however, that as the locking up the door is laid, "thereby to hinder the plaintiff from access to the cistern," it shews that there was no other way. I think that, however, a forced construction.

Rule absolute.

(a) The statutes of jeofails are the 14 *Ed.* 3, st. 1, c. 6; 9 *Hen.* 5, st. 1, c. 4; 4 *Hen.* 6, c. 3; 8 *Hen.* 6, c. 12, c. 15; 32 *Hen.* 8, c. 30; 18 *Elis.* c. 14; 23 *Elis.* c. 3; 27 *Elis.* c. 5; 21 *Jac.* 1, c. 13; 16 & 17 *Car.* 2, c. 18, (called by *Twisden J.*, 1 *Ventr.* 100, "The Omnipotent Act;") 4 & 5 *Ann.* c. 16; 9 *Ann.* c. 20; 5 *Geo.* 1, c. 13; 4 *Geo.* 2, c. 26; 9 *Geo.* 4, c. 15; and 3 & 4 *Will.* 4, c. 42. The 4 & 5 *Ann.* c. 16, s. 2, which extends the previous statutes of jeofails to judgments by default, is as follows:—"And be it further enacted, that all the statutes of jeofails shall be extended to judgments which shall

at any time afterwards be entered upon confession, *nihil dicit*, or *non sum informatus*, in any court of record, and no such judgment shall be reversed, nor any judgment upon any writ of inquiry of damages executed thereon, be staid or reversed for or by reason of any imperfection, omission, defect, matter or thing whatsoever, which would have been aided and cured by any of the said statutes of jeofails, in case a verdict of twelve men had been given in the said action or suit, so as there be an original writ or bill, and warrants of attorney duly filed, according to the law as is now used."

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## The KING v. TINDALL and others.

THIS was an indictment for a nuisance to the port and harbour of Scarborough, by the erection of stages, buildings, &c. in the harbour and in the sea near to the shore, projecting into the harbour and port, whereby the harbour was obstructed and injured, and choked up, and the harbour could not be used in times of tempest and danger without imminent hazard. Plea: not guilty.

The case was tried before Lord Denman C. J., at the Yorkshire summer assizes, in 1833. The jury found a special verdict, which in substance was as follows:—That there was an ancient port and harbour, commonly called the Harbour of Scarborough, in the county of York, for ships and vessels navigating along the northern coast of this kingdom; that the prosecutors are the commissioners for doing and executing the powers and authorities contained in certain acts of parliament thereafter mentioned; that by an act of parliament, passed in the 5 Geo. 2, certain duties were granted for the purpose of enlarging, extending, improving, and keeping in repair, the piers of the said port; that by a certain other act of parliament, passed in the 25 Geo. 2, appointing commissioners to execute all the powers and authorities in the said act contained, it was (amongst other things) enacted, that for keeping the said harbour clean, and also for preventing the sand and sillage from collecting and gathering there, and that the said harbour might be rendered as capacious as possible, no person or persons whatsoever should throw or empty any ballast, &c. into the said harbour, or lay therein any logs or floats of wood or timber, or other material, or *set up any posts therein*, or otherwise encroach upon the said harbour, or do or cause or procure to be done, any other act, matter or thing whatsoever, to prejudice or annoy the same, and that the matter of such prejudice, encroachment or annoyance, should be examined into by the said commissioners

The defendants, who were the owners of the soil adjoining a harbour, were indicted for a nuisance, in erecting planks in it; a special verdict was found, but it did not distinctly appear by the verdict whether the erection was in the harbour or not. The verdict found, that "by the defendants' works, the harbour is in some extreme cases rendered less secure." Assuming the erection to have been in the harbour, it was held that consequences so slight, resulting from the acts of the defendants, did not amount to a nuisance.



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for the time being, who were thereby empowered to inquire into every such offence, and to impose a fine, as therein mentioned; that by a certain other act of parliament, passed in the 41 *Geo. 3*, it was enacted, that the said commissioners for the time being should be, and they were by the said act empowered to purchase any hereditaments which they should judge necessary and proper to be purchased for the improving, widening or extending the said port and harbour, or for making or erecting any quay or wharf; that by a certain other act of parliament, passed in the 3 *Geo. 4*, it was recited, that the said harbour of Scarborough had been greatly improved, a new western pier erected and completed, and the accommodation and security afforded to ships and other vessels resorting to or passing the said harbour, had been greatly increased; that in and subsequently to the year 1817, the commissioners for carrying into execution the acts of parliament, with a view to improve and preserve the harbour, did cause the same to be excavated, by removing divers large quantities of sand from the bottom thereof, and thereby the harbour hath been deepened about four feet, all along the upper part of the harbour, and that this process of excavation and deepening was carried on by the commissioners, amongst other places, within 10 to 20 feet of and immediately before the line of the piles thereafter mentioned; that in the year 1819, the commissioners, with a view further to improve the harbour, removed a pier called an Island Pier, which had previously stood in the harbour, and in the year 1820 erected or completed the pier called the Western Pier, being the same mentioned in the foregoing act of parliament, passed in the 3 *Geo. 4*; that by such excavation the harbour was materially improved and rendered more secure and commodious for shipping; that for many years previously to 1817, the defendants were, and thence have been, and at the respective times of committing the acts within complained of were the owners of certain premises on the edge of the upper part of the harbour, which premises, during all the time thereinbefore mentioned, had been used

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and enjoyed by the defendants as a ship-building yard, and for the purpose of building and repairing ships therein, and for 200 years last past had been used and enjoyed in like manner, and for the like purpose, by the owners thereof for the time being; that during the space of 70 years last past, and upwards, divers piles have been placed and driven into the sandy bottom, in face of the yard and premises of the said defendants, upon which said piles, plank-stages, during all the time aforesaid, have been erected and placed by the owners for the time being of the said yard and premises, and timber and other materials used in building and repairing ships kept thereon, and the same, during the time aforesaid, have been and are proper and necessary for the purpose of carrying on the business of building or repairing ships on the said yard and premises; that until the planking of the same by the defendants thereafter mentioned, the said piles had always stood at certain distances from one another, and that the water might flow freely between them, and might spend itself on the sloping beach; that the defendants, in order to protect their said premises, afterwards connected together the said piles by nailing transverse planks from pile to pile, and inclosed the area contained within the said piles, the same being thus "rendered impervious" to the tide, and presenting perpendicular lines of frontage 5 feet high from the sand, and at ordinary spring tides there is now at high water a depth of from 2 to 3 feet of water against and along the said frontage; that by the aforesaid works of the commissioners a greater rush of tide was and thence hath been caused to and against the beach and sand in front of the said ship-building yard and premises of the defendants than had ever previously been experienced, insomuch that by reason thereof the sand was washed down from before the front of the said yard and premises of the defendants, and the said yard and premises, and their plank-stages aforesaid, at the time of the defendants' committing the said acts within complained of, had become and were thereby in danger of being swept away

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by the sea; *that by the defendants' works the harbour is in some extreme cases rendered less secure*; that the defendants have done nothing more than is necessary to protect their property against the sea, in consequence of the alterations made by the commissioners.

This case was argued in Trinity term, 1836, (June 1,) before Lord Denman C. J., Littledale, Patteson and Williams Js.

First point:  
 The commissioners' acts  
 lawful.

*Alexander*, for the crown. The question for the consideration of the Court is, whether the defendants can, by erecting that which is a public nuisance, legally protect their premises from damage occasioned by the lawful act of the commissioners. In the first place, it is submitted, that the commissioners' acts were lawful. A series of statutes have been passed, empowering the commissioners to make improvements. The 3 Geo. 4, which recites the preceding acts, that the harbour of Scarborough had been greatly improved, that a new western pier had been erected, and the accommodation and security afforded to ships and other vessels resorting to or in passing the harbour, had been greatly increased, is a distinct legislative recognition that what had been done by the commissioners, up to the year 1833, was done in pursuance of the acts of parliament. It is found by the verdict, that the excavations made by the commissioners are improvements. *The King v. Pease* (a) shews the efficacy of legislative permission to do that which would otherwise be a nuisance, and that there is nothing unreasonable in supposing that the legislature may have intended that those who were possessed of property in the vicinity of the harbour, may sustain some inconvenience for the sake of the good which the public would obtain by the deepening of the harbour.

Second point:  
 Although the  
 commissioners' acts not  
 lawful, the  
 defendants'  
 not lawful.

Assuming, however, that what was done by the commissioners was unlawful, still that would not justify individuals in doing that which would injure the public. It is

(a) 1 N. & M. 690; S. C. 4 B. & Ad. 30.

no sufficient answer to the public, when they complain of a nuisance, to be told that the commissioners have acted improperly.

What the defendants did is a nuisance. The special verdict finds that the defendants have laid planking between the piles. What the defendants have done is precisely the same in the result as if they had made a stone wall in a part of the harbour, and by that wall had caused danger in extreme cases to vessels in the harbour. It is laid down by *Hale*, in his *Treatise de Portubus Maris* (a), "that ports ought to be preserved from impediments and nuisances that may hinder or annoy the access or abode, or recess of ships and vessels, and seamen, or the unloading or relading of goods;" and he goes on to give as an instance of a nuisance to a port—"The straightening of the port by building too far into the water, where ships or vessels might have formerly ridden; for it is to be observed that nuisance or not nuisance is a question of fact. It is not therefore every building below the high-water mark, nor every building below the low-water mark, is ipso facto in law a nuisance." Here, however, it is shewn by the verdict, that the port has been impeded. It may be said that the planking was on the defendants' own soil. Assuming that they are the owners of the soil, they are not justified in using it in such a manner as to narrow the harbour. For as is laid down in *Hale de Jure Maris* (b), "The jus privatum of the owner or proprietor is charged with and subject to that jus publicum which belongs to the king's subjects." *The Attorney-General v. Burridge* (c), *The Attorney-General v. Richards* (d), and *The Attorney-General v. Parmeter* (e), lay down the same principle. In *The King v. Lord Grosvenor* (f) also, the same rule is established. In that case the question was, whether the cor-

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Third point:  
What the de-  
fendants have  
done amounts  
to a nuisance.

(a) *Pars secunda*, cap. 7; 1 Hargrave's Collection of Law Tracts, 84, 85.

(b) *Pars prima*, cap. 7; 1 Hargrave's Collec. of Law Tracts, 36.

(c) 10 Price, 350.

(d) 2 Anstruther, 603.

(e) 10 Price, 378.

(f) 2 Starkie, N. P. C. 511.

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poration of London could authorize the erection of a landing place in the Thames, inconvenient in some respects, supposing the public gained an equal convenience in other respects. The jury found it a nuisance unbalanced by such a convenience. From the language of *Abbott C. J.* in that case, it would appear that in a public river no change inconvenient to the public can be made, however beneficial it may be to an individual. *The King v. Russell* (a), which may be cited for the defendants, was also a question of comparative advantage to the public, and is inapplicable to the present case. From the act of the defendant in that case, the public derived some advantage, here they derive none. Besides, it has been overruled by the late case of *The King v. Ward* (b). *The King v. Trafford* (c) may be relied on by the defendants. In that case the defendants, who were occupiers of land adjoining to a river and brook, had, for the protection of their lands, but subsequently to the making of a canal and aqueduct in the neighbourhood of their land, erected or heightened certain artificial banks called fenders, on their respective properties, in order to prevent the water, in time of flood, from escaping and flowing over their lands. The consequence of the erecting or heightening of the fenders was, that the water was thrown back on the arches of the aqueduct and overflowed the country adjoining to it. The Court of King's Bench determined that the defendants were not justified in altering the course in which the flood water had been accustomed to run, and it was laid down that the ordinary course of water cannot be changed or obstructed for the benefit of one class of persons to the injury of another. The Court of Exchequer Chamber agreed in the principle laid down by the Court of King's Bench, but reversed the judgment, and awarded a venire de novo on three grounds: 1st, because it did not appear that raising the fenders was not an accustomed usage; nor, 2dly, whether the

(a) 9 D. & R. 566; S. C. 6 B. E. 484.  
 & C. 566.

(c) 1 B. & Ad. 874; S. C. in error, 8 Bing. 204.

(b) 6 N. & M. 38; S. C. 4 A. &

course of the flood water was its ancient and rightful course; nor, 3dly, that the embankment had not wrongfully penned back the water. In each of those three particulars, this case is distinguishable: 1st, the defendants had no accustomed usage to warrant what they have done, for they first planked in the piles in the year 1826. [*Littledale J.* There was no occasion to plank in before that time.] That may be so, but still there was no usage; 2dly, the sea had been accustomed to flow over the area now planked in; 3dly, the commissioners acted under the express powers of the act, and, it is admitted, improved the harbour by the excavations. Here, therefore, the three objections in *Trafford v. The King* (a) do not exist, and consequently, according to the law laid down by both Courts in that case, the defendants are liable. In *Trafford v. The King*, too, the fenders were erected on the defendant's own soil; here, the right was at most but an easement to have the piles in their open state, and that right ceased when the piles were planked. In *The King v. The Pagham Commissioners of Sewers* (b), which may also be cited for the defendants, the commissioners, in the bonâ fide discharge of their duty, erected defences against the inroads of the sea, and in so doing made it flow more violently against the adjoining lands and damage them. It was held that they were not liable to the owner of the adjoining land for the injury done to it, for they were justified in protecting themselves, although another might be prejudiced. That rule would apply to justify the defendants, *if they had built upon their own soil, and had not excluded the water from its accustomed course.* In that case, too, the question was between private individuals. The defendants therefore have been guilty of a nuisance, in making this planking in the port and harbour.

*Cresswell*, contra. The argument on the other side assumes that the planking by the defendants is in the harbour. There is no finding in the special verdict that what the defendants did was done in the harbour, although the

(a) 8 Bing. 204.

(b) 2 M. &amp; R. 468; S.C. 8 B. &amp; C. 355.

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First point:  
The defend-  
ants have not  
injured a pub-  
lic right.

indictment in every count so charges it. It would appear from the special verdict, that what was done was done on the defendants' own soil and property. It is incumbent on the prosecutors to shew that the defendants have injured a public right without lawful excuse. First, as to the public right. The commissioners are not justified in what they did; they caused the water so to flow upon the defendants' premises, that they might have been entirely washed away. The commissioners had no such right, either by statute or from the circumstance of Scarborough being a port. What is the right which the public have in a port? To navigate the sea wherever it flows, but they have no right to the soil of the shore. The only privilege which the public acquire by the king making a place a port, is that of loading and unloading. They have no right to the sea-shore, that is to say, the land between the high and low water mark. That is laid down by *Hale*, and is recognized by *Holroyd J.*, in his judgment in *Blundell v. Catterall* (a). The public have no more right to the margin of the sea than the bank of a navigable river, and *Ball v. Herbert* (b) determines they have no right to the bank of a navigable river; *Co. Litt.* (c). The king, by erecting Scarborough into a port, could not grant to any one the privilege of causing the soil of the adjoining land to be washed away. By the common law every one has a right to protect himself against the inroads of the sea, and if that right exists at all, it surely may be put in force against those who occasion the mischief. But for the act of the commissioners in deepening the harbour, the plank-  
ing in its present state would not be productive of mischief. The commissioners can have no greater right than the individual owner of the port, and if such an owner had deepened the harbour, and caused the water to recoil upon the defendants' premises, they might have maintained an action against him. If they might maintain an action, surely they might protect themselves by planking. The commissioners, neither by the common law nor by statute, have any right to the soil. The first statute gives power

(a) 5 B. & Ald. 291. (b) 3 T. R. 253. (c) 261 a, note 1.

to enlarge the pier and receive tolls, and to expend the tolls in works. The next statute gives power to enlarge the harbour, but no authority is given to injure a third person, for the purpose of enlarging the harbour. In the next statute, power is given to the commissioners to purchase land, which shews that they were not to enlarge the harbour by other means. There is nothing in any of the acts to authorize the commissioners to do any act which the individual owner of the harbour might not have done. It is true that according to the case of *Sutton v. Clarke* (a), no action could be maintained against the commissioners, but that does not deprive the defendants of the right which they possess of defending themselves. Then if the acts of parliament have not given the right to the public, it has not been acquired by any other means, either by user or by dedication, or by any thing analogous to either. The commissioners, by altering the harbour, could not deprive the owners of adjoining land of using their land in any way they thought proper; *Rolle's Abr.* title Trespass (b). No person who is injured by what the defendants have done could maintain an action against them. Indictments and actions are on the same footing, and if the defendants' acts were justifiable in the one case, they would be in the other. The reason why an indictment is preferred, is to avoid the

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Second point:  
The defend-  
ants had a  
lawful excuse  
for their acts.

(a) 6 Taunt. 29.

(b) The following is a translation of the passage in Roll. Abridg. and is taken from Vin. Abr. vol. xx. page 514:

"If *A.* be seised in fee of a copyhold land next adjoining to the land of *B.*, and *A.* erects a new house upon his copyhold land, and some part of the house is erected upon the confines of his land next adjoining to the land of *B.*, if afterwards *B.* digs his land so near to the foundation of the house of *A.*, but on no part of *A.*'s land, by which the foundation of the house and the house falls into

the pit, yet no action lies by *A.* against *B.*, because it was *A.*'s own fault that he built his house so near to the land of *B.*, for he, by his act, cannot hinder *B.* from making the best use he can of his own land. P. 15, Car. B. R., between *Wilde* and *Minsterley*, per Curiam, after a verdict for the plaintiff. But it seems that a man who has land next adjoining to my land, cannot dig his land so near my land that thereby my land shall go into his pit, and therefore if the action had been brought for this, it would lie."



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multiplicity of suits, for otherwise every subject might maintain an action for the same nuisance; *Chichester v. Lethbridge* (a), *Williams's case* (b). Thus Lord Tenterden, in *The King v. Trafford* (c), says, "If the wrong thus set forth (in the verdict) would have enabled an individual owner of land to maintain an action for it, it is properly the subject of an indictment, like the present, for a public nuisance." As another illustration of the right of self-protection, it is laid down in *Hawkins* (d), that if a party has entered into a recognizance to keep the peace, it is not forfeited by an assault committed in defence of his property. *The Attorney-General v. Richards* (e), and *The Attorney-General v. Burridge* (f), do not bear upon the present question, nor do *The King v. Lord Grosvenor* (g), or *The King v. Russell* (h). The question in those cases was, whether, upon the whole, the act complained of as a nuisance was not of advantage to the public. *Rex v. The Pagham Commissioners of Sewers* (i), is an authority for the defendants, as there the right of every one to protect himself against the sea is distinctly recognized. Therefore, although the commissioners had the right to excavate, the defendants had a right to protect themselves; nor does *The King v. Trafford* (k) impugn the doctrine there laid down. The decision in that case proceeded on the ground that the ordinary course of the water had been changed by the defendants, and there is a material difference between the acts of the commissioners in this case, and those of the canal company in that. The proprietors of the canal company made provisions for the passage of the water, here the commissioners did not. *The King v. Pease* (l) only shews that the commissioners could not be indicted for a nuisance.

(a) Willes, Rep. 71.

(b) 5 Rep. 72.

(c) 1 B. & Ad. 886.

(d) Book 1, c. 80, s. 23.

(e) Anstruther, 603.

(f) 10 Price, 350.

(g) 2 Stark. N. P. C. 511.

(h) 9 D. & R. 566; S. C. 6 B.

& C. 566.

(i) 3 M. & R. 468; S. C. 8 B.

& C. 355.

(k) 1 B. & Ad. 874.

(l) 1 N. & M. 690; S. C. 4 B.

& Ad. 30.

*Trufford v. The King* (a) is an authority for the defendants, for here it was not the ancient course of the sea which the defendants have interrupted, but the flow of water which was occasioned by the acts of the commissioners.

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Then what is the meaning of that part of the verdict which finds, that by the defendants' works the harbour is in some extreme cases rendered less secure. It is too ambiguous to warrant this Court in passing judgment upon the defendants. If it means that the harbour would be insecure if there were a violent tempest, the defendants have not committed a nuisance. If a party allow a house to be out of repair, so as to endanger the public, it is a nuisance; *The Queen v. Watts* (b). But if injury is done to the public by a tempest, the occupier is not liable; *Tubervil v. Stamp* (c). Third point.

*Alexander*, in reply. If there be one period more than another when the harbour should be secure, it is in times of storm and tempest. It is said there is no finding that what the defendants did was done in the harbour. It is impossible to read the verdict and the description of the premises, and not to conclude that what was done was done in the harbour. How could the water flow between the piles, unless they were in the harbour? It is said that the mischief has been occasioned by the acts of the commissioners. The excavation did not approach within ten feet of the defendants' premises. But the question is not whether the defendants have been injured, but whether they have adopted the proper mode of redress. There are clauses in the acts which authorize the commissioners to repair the harbour. Where powers are to be exercised, which are only compatible with the commissioners meddling with the soil, it must be assumed that they have that power given to them. Assuming that the commissioners have done that which was unlawful, can that authorize the defendants in doing that which injures the public? With

(a) 8 Bingh. 204.

(b) 1 Salk. 357.

(c) 1 Salk. 13.

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respect to the cases which have been cited from *Rolle's Abridgment*, which are collected with many others in *Wilkes v. The Hungerford Market Company* (a), they are all cases between private individuals. There are many cases in which an individual cannot bring an action, but in which a party is indictable. With respect to *The King v. The Pagham Commissioners of Sewers* (b), that is undoubtedly an authority for the defendants to shew, that for their own protection they might erect works, if they were not prejudicial to the public. The language of *Bayley J.* in that case is applicable to the present,—“If a man sustains damage by the wrongful act of another, he is entitled to a remedy, but to give him that title those two things must concur, damage to himself and a wrong committed by the other. That he has sustained damage is not of itself sufficient. Here the defendants may have sustained damage, but the commissioners have done no wrong.” To apply that to the present case, the defendants have no right to an acquittal, because they have sustained damage, but they must shew that the acts of the commissioners were wrongful. The defendants have prevented the sea from flowing where it was accustomed to flow, and have injured the public, they are consequently guilty of a nuisance.

*Cur. adv. vult.*

Lord DENMAN C. J., in Hilary term, 1837, delivered the judgment of the Court, as follows:

This is an indictment for an alleged nuisance in the harbour of Scarborough. The indictment in all the counts charges the defendants with having erected or continued certain piles and planking in the harbour, and thereby obstructed and rendered it insecure.

The special verdict in substance finds that the defendants are owners of premises, used as a yard for ship-building, on the edge of the upper part of the harbour; that the piles in question have been erected and driven into the

(a) 2 Bing. N. C. 281. (b) 2 M. & R. 468; S. C. 8 B. & C. 355.

*sandy bottom, in face of the said yard and premises, during the space of seventy years, and that the water might flow between the piles, until the planking was placed there. It then finds that the commissioners, under certain acts of parliament, erected works and deepened the harbour, so as to cause a greater rush of water against the defendants' premises than formerly, to the extent of washing away the soil, and threatening destruction to their building-yard; that the defendants, in order to protect their property, placed transverse planking in front of the piles, and have done nothing more than was necessary to protect their property against the sea, in consequence of the alterations made by the commissioners. It then finds, that by the defendants' works the harbour is in some extreme cases rendered less secure.* The Court has considered much whether this verdict is not so imperfect as to make it necessary to award a venire de novo, but upon the whole we think that the facts are so found as to enable us to give our judgment upon them. It is not indeed *expressly* found that the piles or planking are *in* the harbour at all, which is the charge in the indictment; but assuming that this may be collected from the whole verdict, the question will be, whether the effect produced by them is sufficiently described to enable the Court to say, that the defendants' works are in law a nuisance. Doubtless the expression, "that by the defendants' works the harbour is in some extreme cases rendered less secure," is vague and indefinite, but it is sufficient to convey to the mind that the defendants' works, even when other causes concur with them, and produce their worst result, do but diminish the security of the harbour, possibly in the least possible degree, on very rare occasions and under undefined circumstances.

Now without deciding at all how far the conduct of the defendants could under the circumstances be justified, if their works of themselves injured the harbour or rendered it insecure, or even, if combined with other things, they had that effect *generally*, we think that the jury must be taken to ask

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by their special verdict for our decision, whether such consequences as are therein stated *must* amount to a nuisance. We do not think that they *must*, but hold, on the contrary, that no person can be made criminally responsible for consequences so slight, and uncertain, and rare, as are stated by this verdict to result from the works of the defendants. A verdict of not guilty *must* accordingly be entered.

A verdict of not guilty entered.

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MAYALL and others v. MITFORD and others.

In a policy of insurance against fire, upon cotton mills, "it was warranted that the said mills were brick built, and stated that they be warmed and worked by steam, lighted by gas, *worked by day only*." It was held, that the stipulation that the mills should be worked by day only, meant that the usual cotton manufacture carried on by the mills in the day time, should not be carried on at night, and that it was, consequently, no breach of this warranty, that on one occasion, in order to turn machinery in an adjacent building, the steam-engine, (which was not in the mill, but in an adjoining building,) and certain perpendicular and horizontal shafts in the mill, were at work. And that a plea to a declaration on the above policy, that a certain steam-engine and certain perpendicular and horizontal shafts, *then being respectively parts of the said mills*, were, without consent of the defendants, worked by night, was bad.

**ASSUMPSIT.** The declaration stated, that on November 19, 1833, the defendants, being three of the directors of the *Guardian Insurance Company*, entered into a policy with the defendants, whereby they agreed to insure against fire certain mills, in which the defendants were interested, on condition of the plaintiffs paying to the defendants 23*l.* 12*s.* 6*d.* at the date of the policy; and also to pay annually 12*l.* on the 25th of November, during the continuance of the agreement for insuring from loss or damage by fire, the property thereby described, not exceeding the sum specified on each article, namely, on clock-maker's work, carding and breaking engines mounted, and in use, and on all moveable utensils in cotton mill (A.), known as *The Union Mill*, situate near Oldham, 2550*l.*; on the like description of property in cotton mill (B.), communicating with (A.) 450*l.*; it was warranted that the said mills were brick built, and stated that they were warmed and worked by steam, lighted by gas, *worked by day only*, wholly in the occupation of

the first-named assured, one firm only, and in every respect conformable to the description and sketch deposited in that office, to the latter of which the letters referred. That the above mills communicated by shafts holes only. The declaration then alleged that the mills had been consumed by fire, and averred a breach of the promise contained in the policy. First plea: that a certain steam-engine, and certain upright and horizontal shafts, *then being respectively parts of the said mills*, in the said policy of assurance mentioned, after the making of the said policy of assurance in the said declaration mentioned, to wit, in 1834, and on divers other times between that time and the destruction of the said premises by fire, as in the said declaration mentioned, were, without the leave or consent of the said defendants, *worked by night, and not by day only*. There were three other pleas, which it is not necessary to state.

The replication traversed the first and second pleas, and replied *de injuriâ* to the other two.

The policy in this case is upon the same mill and premises as the policy in *Whitshead v. Price* (a).

At the trial before Lord Abinger C. B., at the Liverpool assizes in 1835, it appeared, that immediately adjoining to the mills insured was a workshop belonging to a millwright of the name of *Wharton*. The mills were worked by means of a steam-engine with certain upright shafts, and the same engine was used to work some machinery in *Wharton's* premises, by means of a horizontal shaft, which passed through the mill. *Wharton's* machinery was usually worked by day. The fire took place on the 28th day of June. On the evening before that day *Wharton* was preparing an engine which was to be sent off next day, and the occupiers of the mill agreed to continue to work the engine for him until one or two o'clock in the morning. On the same evening the spinning machines were thrown out of gear, which prevented the mill's working, but in order to work the machinery in *Wharton's* workshops, the perpendicular shafts

(a) 2 C. M. & R. 447.

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which were in the mill, as well as the horizontal shafts, were in motion. It did not appear that the fire was occasioned by the working of the steam engine. Mills worked all night were usually worked by two sets of hands, and the premium on an insurance on such a mill, was higher than on a mill worked by day only. The question left to the jury was, whether the working during the night of the steam-engine and shafts increased the risk. The jury answered that question in the negative. A verdict for the plaintiffs was entered on all the issues, except the first issue, on which a verdict was entered for the defendants. In Michaelmas term 1835, *Blackburn* obtained a rule nisi to enter judgment for the plaintiffs, notwithstanding the verdict on the first issue; against which

*Cresswell, J. L. Adolphus, and W. H. Watson* now shewed cause. The warranty was, that the mills should be worked by day only. If the steam-engine and machinery were working, it is immaterial whether or not they were working for the cotton mill or for another mill. The plea is, that part of the mill was at work, and if part was at work, it is a breach of the warranty. A warranty in a policy of insurance must be literally performed; *De Hahn v. Hartley* (a). *Dobson v. Sotheby* (b), which may be cited for the plaintiffs, is distinguishable. That part of the policy upon which the question arose in that case, was mere description, and not a warranty. *Whitehead v. Price* (c), was an action upon a different policy, and the judgment of the Court proceeded upon the particular expressions in the policy. *Shaw v. Robberds* (d), is also distinguishable, for in that case also, the words of the policy upon which the question arose, were considered as words of description. It is immaterial whether or not the fire was occasioned by the working of the mill during the night. In the case of an insurance on a ship, if there be a deviation on the voy-

(a) 1 T. R. 343.

(b) M. &amp; M. 90.

(c) 2 C. M. &amp; R. 447.

(d) *Ante*, p. 279.

age, the insured cannot recover, although the deviation has not occasioned the loss, and the reason is, that the warranty has not been fulfilled. So, in this case, the warranty has been broken, and the cause of the fire is therefore immaterial.

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Sir *J. Campbell*, A. G. contrà. Undoubtedly the same rule which is applicable to marine policies, is applicable to this. The question is, what did the insurers warrant? Some mills usually work all night, with two sets of workmen, and all that the insured intended to warrant was, that this mill should not be worked in that manner, but only during the day time. The substance of the stipulation was, that the manufacture should not be carried on at night. A warranty is to be construed reasonably. Thus, if it be stipulated that a ship shall sail with convoy, she may sail to the place of rendezvous without convoy.

Lord DENMAN C. J.—The Court of Exchequer held, in the case of *Whitehead v. Price* (a), that, unless the mill was at work, with the usual cotton manufacture carried on by it, there was no breach of the warranty. The question in this case is, whether the plea is good. The warranty is, that the mill shall not work by night, and the plea is, that the warranty is broken because parts of the mill were at work during the night. I cannot see that it necessarily follows, that because part of the mill is working, therefore the mill is working. I think it is an abuse of terms to say so. On the contrary, it is easy to believe that a single part of the mill may be at work, and yet that the parties may not work the mill within the meaning of the warranty. For instance, suppose there was a pipe to supply the mill with water, the pipe might be at work at all hours of the night to supply the water that would be necessary to the working of the mill in the day time, there would, in that case, be a working of part of the mill at night, but it could not be said there was a working of the mill.

LITLEDALE J.—I am of the same opinion. The terms

(a) 2 C. M. & R. 447.



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of the warranty are, that the mill is "*worked by day only*," that is the essential part of the warranty. The question is, whether the plea ought not to have stated that the mill *was* worked by night. The shaft in the mill and the steam-engine may be at work at night, for the better working of the mill during the day, and in that case it could not be said that the mill was at work by night. The plea is, in my opinion, insufficient in alleging that part of the mill was worked at night. It is said that the mill cannot go on without the shafts in the mill revolving, still the shafts are not parts of the mill within the meaning of the warranty. The plea ought to have been in the words of the warranty, viz. that the mill worked by night. The question for the jury would then have been, whether the working of part of the machinery by night could be fairly said to be a working of *the mill* by night, within the meaning of the warranty.

PATTESON J.—The warranty is, that the mill shall be worked by day only? What is the meaning of the expression—a mill worked by day only. In the first place, I would observe, that if it be intended to plead any thing as a breach of warranty, it is, I will not say absolutely necessary, but advisable to plead in the very words of the warranty; and if this plea had been, that the mill was worked by night, it would have been a good plea. The only question then would have been, whether it was established by the evidence. I am not prepared to say, that if the plea had stated facts, to shew that the usual manufacture carried on by day was carried on by night, it might not have been a good plea, although it did not pursue the words of the warranty; but that is not the case here. The words of the plea are, that the steam-engine and shafts were worked by night. Those words are ambiguous; it may be that the shafts and steam-engine were worked for the purpose of carrying on the business of the cotton mill, or it may be that they were merely turning round for some other purpose. I think, therefore, that the plea is bad for not shewing that the mill was worked by night.

**COLERIDGE J.**—As this plea relies upon a breach of the warranty, it would be a bad plea if all the facts stated in it were true. For, assuming the facts stated in the plea to be proved, still the warranty might not be broken. The question therefore is, what is the true construction of the warranty? The warranty is, that the brick building shall be lighted by gas, and worked by day only. The warranty, in my opinion, is, that the mill, that is to say, the usual manufacture carried on by these mills, is not to be carried on by night, but by day only. I do not mean to say that it is necessary that every part of the process must be carried on, but there must be something done so as in common sense to maintain the affirmation, that the mill was working. Here it is said, some of the shafts in the mill were turning round when the hands were away, and when there was no process going on for the manufacture of cotton. To say that that was a working of the mill by night is quite unreasonable.

Rule absolute.

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**FORD v. LECHE, Esq. Sheriff of Cheshire.**

Wednesday,  
May 3rd.

**THIS** was an action on the case against the defendant, who was the Sheriff of Cheshire, for an escape. The declaration stated, that on the 8th June, 1832, one *E. W. Dickenson* was indebted to the plaintiff in the sum of 600*l.*: that the plaintiff, for the recovery of the debt, sued out of the King's Bench, against *E. W. Dickenson*, an alias testatum capias

1. Where a plaintiff appoints his own bailiff to execute a writ, the sheriff is relieved from all responsibility until the party is arrested and

delivered into the actual custody of the sheriff.

2. The sheriff received a cap. ad resp. against *D.*, at the suit of *R.* Two days afterwards he received from *F.* an alias capias also against *D.*, at the suit of *F.* *F.* wrote the following letter to the under-sheriff:—"Myself v. *D.* I enclose you a writ herein, and shall feel obliged by your granting a warrant hereon, directed to Mr. *M.* and Mr. *B.* I shall write to Mr. *B.* in a day or two." The sheriff issued a warrant to Mr. *M.*, on the writ at the suit of *R.*, who arrested *D.* on that warrant, took a bail-bond from him, and then allowed him to go at large. It was held, that the letter was an appointment by *F.* of Mr. *M.* and Mr. *B.* to be his special bailiffs; that the sheriff was not therefore liable to an action for an escape: and that although the actual arrest in the one action was a constructive arrest in the other, yet that the sheriff was not liable, as the agency of Mr. *B.* and Mr. *M.* to the plaintiff did not cease when the arrest was made.

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ad respondendum, directed to the sheriff of Cheshire, returnable on the 2d of November, indorsed for bail for 500*l.*, which writ was delivered to the defendant, then sheriff of Cheshire, to be executed. That the defendant afterwards arrested *Dickenson*, and subsequently, without the leave of the plaintiff, suffered him to escape and go at large. The second count was, for not arresting *Dickenson* when the defendant might have done so. The first plea was, not guilty. There were two others, which it is not necessary to state.

At the trial before Lord *Abinger* C. B. it appeared, that on the 25th May, 1832, the plaintiff issued a special testatum *capias* against *Dickenson*, which, on the 28th of May, was delivered to the sheriff. This writ was indorsed for bail for 500*l.* The plaintiff was an attorney, and had a client of the name of *Aldridge*. The plaintiff issued a writ for 10,000*l.* for *Aldridge* against *Dickenson*, which was sent to the sheriff with the writ in his own action. On those writs two warrants were granted, directed to two officers, one called *Bateman* and the other *Mee*. *Dickenson* was not arrested on those warrants. On the 7th June, 1832, an alias testatum *capias* was issued by the plaintiff, returnable on the 2d November, and sent on the following day by the general post, enclosed in a letter, of which the following is a copy :

“ *Myself v. Dickenson. Aldridge v. The Same.*

“ Sir,—I enclose you writs herein, and shall feel obliged by your granting warrants thereon, directed to Mr. *Bateman* and Mr. *Mee*. I shall write to Mr. *Bateman* in a day or two.”

Upon this writ *Dickenson* was not arrested. The sheriff had received another writ against *Dickenson*, at the suit of one *Rennie*, upon which, on the 3d July, 1832, he issued a warrant directed to *Mee*. On the 20th of August *Dickenson* was arrested on this warrant by *Mee*. *Dickenson* gave a bail-bond, and was allowed to go at large. After *Mee* had allowed *Dickenson* to go at large, *Bateman* brought him two

warrants upon the writs issued by the plaintiff and *Aldridge*, but *Dickenson* had then left Cheshire. The under-sheriff, hearing that *Dickenson* had been arrested, sent for *Mee*, and censured him for allowing *Dickenson* to go before he had ascertained whether there were any other writs in the office. It was contended, that under these circumstances the defendant was not liable for any neglect which might have been committed by *Mee*, as by the letter of the 8th of June the plaintiff had appointed him to be his bailiff. His lordship was of this opinion, and directed the plaintiff to be nonsuited, which was accordingly done. In Michaelmas term, 1835, *Alexander* obtained a rule nisi to set aside the nonsuit, and for a new trial; against which

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*Cresswell*, *Wightman*, and *Tomlinson* now shewed cause. By the letter of the 8th of June, the plaintiff appointed *Mee* and *Bateman* his special bailiffs, to execute the writ. The only duty of the under-sheriff, after the receipt of that letter, was to place *Bateman* and *Mee* in a situation to act under the instructions of the plaintiff, and the sheriff was no longer responsible for any negligence of which *Bateman* or *Mee* might be guilty. *Bateman* and *Mee* became the agents of the plaintiff. In *Foster v. Blakelock* (a), *Abbott C. J.* says, "by employing a particular bailiff, do you not make him your servant?" If *Mee* had actually arrested *Dickenson*, and afterwards allowed him to escape, the sheriff would not have been responsible, for the agency of *Mee* to the plaintiff did not cease upon the arrest. There are a number of authorities which establish, that if a plaintiff appoint a special bailiff to execute a particular writ, the sheriff is no longer responsible for the acts of the bailiff. *Taylor v. Richardson* (b), which was cited when the rule was moved for, differs from the present case. In that case, the agency of the officer had ceased, for the arrest had been actually made, a bail-bond given, and a render made, and it was for allowing the party to go at large subsequently, that the

(a) 8 D. & R. 48; S. C. 5 B. & C. 328.

(b) 8 T. R. 505.

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action was brought against the sheriff. *Benton v. Sutton* (a) is inapplicable. The fact, on which *Shepherd*, who was counsel in the case, relied, did not appear on Mr. Serjeant *Runnington's* notes, who tried the case. *De Moranda v. Dunkin* (b), and *Hamilton v. Dalziel* (c), are authorities for the defendant. They determine, that where a special bailiff is appointed by the party, the sheriff is not responsible, although the officer actually makes an arrest, and then permits the person arrested to go at large. It is contended for the plaintiff, that because the writ was in the sheriff's office at the time the arrest was made at the suit of *Rennie*, that in point of law that was an arrest on the writ issued by the plaintiff, but as the sheriff would not have been liable if *Mee* had actually made the arrest, he cannot be liable in respect of this constructive arrest.

*Alexander* and *J. Bailey* contra. The sheriff had both writs in his possession, one issued by the plaintiff, the other by *Rennie*. He arrested on the latter and not on the former; he is therefore answerable to the plaintiff for his negligence. In *Frost's* case (d), which is the earliest on the subject, it was resolved, "that when a man is in the custody of the sheriff by process of law, and afterwards another writ is delivered to him to arrest the body of him who is in his custody, presently he is in his custody by force of the second writ by judgment of law, although he do not actually arrest him, for to what purpose should he arrest him who is, and was before, in his custody? Et lex non præcipit inutilia quia inutilis labor stultus: and the words of the *capias ad satisfaciendum* are not only *quod capiat, &c.*, but *quod salvo custodiat, &c.*, ita *quod habeat corpus, &c.*, so that although he cannot take him (whom he has) in his custody, yet he may safely keep him, and therefore agrees, 7 H. 4, 30 b." (e). In this case the language of the writ would be, to take and safely keep *Dickenson*.

(a) 1 Bos. &amp; P. 24.

(b) 4 T. R. 119.

(c) 2 W. Black. 952.

(d) 5 Rep. 89 a.

(e) See *Hodges v. Marks*, Cro.

Jac. 485; 2 Roll. Abr. 479.

[*Patteson J.* In *Frost's* case, the sheriff could not arrest the party, because, before the second writ was delivered to him, he was already in custody. In this case the sheriff had not the party in custody when the second writ came to him. Both writs were delivered before the arrest was made.] *Jackson v. Humphries* (a), and the judgment of *Eyre C. J.* in *Benton v. Sutton* (b), support the doctrine laid down in *Frost's* case. When *Dickenson* was arrested by the officer at the suit of *Rennie*, he was by law in the custody of the sheriff at the suit of *Ford*. [*Patteson J.* You must go further than the position in *Frost's* case; you must shew that the circumstance of the writ remaining in the office, when *Dickenson* was arrested upon the first writ, was an arrest also upon the writ remaining in the office.] That is precisely the same as *Frost's* case. [*Patteson J.* In *Frost's* case a warrant had been granted. Here no warrant had been granted. *Lord Denman C. J.* How do you answer the objection, that the person who allowed *Dickenson* to escape, was the person appointed by the plaintiff to execute the writ?] There was no *appointment* by the plaintiff. He merely requested the under-sheriff to direct his warrant to particular officers. He did not intend to constitute *Mee* and *Bateman* his agents. In *Bulson v. Meggat* (c) it was laid down by *Coleridge J.*, that the request to the sheriff to deliver his warrant to a particular person, is not sufficient to constitute the officer the plaintiff's special bailiff. The letter in this case is nothing more than a request to deliver the warrant to a particular officer. *Hamilton v. Dalziel* (d), is distinguishable from the present case; for in that case the writ was not sent to the under-sheriff, but to a person who was in fact the agent of the plaintiff. *Porter v. Viner* (e), and *Pallister v. Pallister* (f), are both distinguishable from the present case. In those cases the attorney had interfered with the execution of the process. No-

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(a) 1 Salk. 273, 274.

(d) 2 W. Black. 952.

(b) 1 Bos. & Pul. 24.

(e) 1 Chit. Rep. 613 n.

(c) 4 Dowl. P. C. 557.

(f) 1 Chit. Rep. 614 n.

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thing of the kind took place here, and the under-sheriff censured the officer for allowing *Dickenson* to go at large, without putting in bail in all the actions. In *De Moranda v. Dunkin (a)*, the application was to the sheriff, and not to the under-sheriff, whose business it is to conduct business of this description. Here the application was properly made to the under-sheriff.

Lord DENMAN C. J.—The first question in this case is, whether the plaintiff in this action (being the plaintiff in a former action against the debtor) did in point of fact appoint his own bailiff to make the arrest. I do not think there can be the slightest doubt of it, for the plaintiff, in his letter, desires the under-sheriff to direct writs to two persons of the names of *Mee* and *Bateman*, and then adds, “I shall write to *Bateman* in a day or two.” It would require a great deal of ingenuity to convince me that those expressions mean less than this—“You, the under-sheriff, are to be my agent, to direct the writs I send to you to two officers whom I appoint, and to which officers I mean to give directions in a certain time.” That latter superseded the authority of the sheriff, and made *Mee* and *Bateman* the persons who were to execute the writs for the plaintiff. The plaintiff’s writ against *Dickenson* was sent on the 8th of June, and on the 5th of June a writ had previously issued against the same debtor, at the suit of another creditor, and on the latter writ the debtor was arrested. Being arrested, he was in some sense in custody at the suit of the plaintiff; but was he in custody at the suit of the plaintiff, so that the plaintiff might charge the sheriff with an escape? The defendant was let out of custody before any thing was communicated by the plaintiff to *Mee* and *Bateman*, and before the determination of the authority given to them by the plaintiff. The escape was then from an officer appointed by the party in the action. When an officer is appointed by the plaintiff to execute the process, the sheriff is relieved from responsibility. That principle is recognised in so many cases, that it

would be idle to enlarge upon it now; it is laid down in *Porter v. Viner* (a), and the reason of the rule is explained by Mr. Justice Buller, in *De Moranda v. Dunkin* (b). The case before my brother Coleridge determined, that the mere expression of a wish by the attorney that a particular officer might be employed to execute the writ, is not to be considered as the appointment of an officer, so as to supersede the authority of the sheriff. Here the party acted in such a way as to take from the sheriff all power, except to issue the warrant; the sheriff is therefore relieved from all responsibility.

LITLEDAL J.—There is no doubt that the letter written by the plaintiff appointed *Mee* and *Bateman* special bailiffs, and suspended the duty of the under-sheriff until he received further instructions from the plaintiff. The moment *Dickenson* was arrested at the suit of *Rennie*, he was, in law, in custody at the suit of the present plaintiff also. It is contended, that *Dickenson* being in actual custody in the action by *Rennie*, and constructively in custody in the action by the plaintiff, it was the duty of the sheriff to take care that he did not go at large, and prevent him from making an escape, and that, as he was allowed to escape, the sheriff ought to be answerable for it. I think this cannot be considered, in point of law, an escape for which the sheriff is answerable. *Dickenson* was, no doubt at the time of his arrest, in the custody of the sheriff, to a certain extent, at the suit of the plaintiff in the present action, but that custody was not of such a nature as to render the sheriff responsible for his safe custody. The warrants, by the letter, were to be granted to two persons, and after the sheriff had granted the warrants he had no further duty to perform. The plaintiff took the management, to a certain degree, out of the hands of the sheriff, by writing to say who were the persons to be appointed bailiffs, and that he would write to *Bateman* in a day or two. The only thing in which the under-sheriff committed a mistake was,

(a) 1 Chit. Rep. 613 n.

(b) 4 T. R. 119, 120.

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that he did not, when *Dickenson* was in custody at the suit of *Bennie*, grant warrants for the continuance of that custody. The letter, in my opinion, was a suspension of the authority of the under-sheriff, and the effect of it is, to exempt the sheriff from liability.

PATTERSON J.—Our decision in this case will not throw any doubt whatever upon the law with respect to the duty or the liability of the sheriff in ordinary cases. It is clear, that if a man be in the custody of the sheriff, in the sheriff's prison, and afterwards a writ is lodged with the sheriff against that same person, the mere lodging of the writ with the sheriff makes him in the custody of the sheriff in the second action, for the plain reason given in *Frost's* case, that the sheriff cannot arrest on the second writ, because he is already in his custody. It is also clear, that if the sheriff have a writ sent to him, and he issue a warrant upon that writ to his officer, and afterwards, before the defendant is arrested upon that warrant, other writs come into the sheriff's office, the sheriff is bound to arrest upon those other writs, just as much as upon the writ upon which he has already granted warrants; and I have no doubt, if the officer to whom that warrant is granted, arrests upon that warrant, the moment he has the man in custody upon the one writ, he becomes in the custody of the sheriff upon all those writs which are then in the sheriff's office. Why? Because it is the duty of the sheriff to arrest upon all the writs, and to give warrants upon all, and to inform his officers that all those writs have been lodged in the sheriff's office; and if he neglect that duty, he is answerable for the consequences. That is not, however, affected by our decision in this case, because we decide this case upon the ground that the plaintiff has appointed special bailiffs. Did the plaintiff appoint special bailiffs? I have no doubt the letter was an appointment of special bailiffs. It does not merely request particular persons to be appointed to execute this writ, but it goes on to say, "I will communi-

cate with *Bateman* in the course of a day or two;" thus taking the matter out of the sheriff's hands. It is saying, in effect, "You are not the person to communicate with the bailiff; I will communicate with him, and I therefore appoint him to execute the writ upon the present occasion." The case decided by my brother *Coleridge* proceeded on the ground, that the mere suggestion of a party that he wished a particular officer to be employed, was not the appointment of a special bailiff. In that decision I agree. The question, whether special bailiffs have been appointed in a particular case, is a matter of evidence rather than of law. Assuming then, that there has been an appointment of special bailiffs, what is the effect of that appointment? The sheriff may be prevented from sending his warrant to an officer in whom he has confidence. It happens, in this case, that the same person who held the warrant directed by the sheriff, was appointed by the plaintiff, but it might not have been so. In my opinion, if there are several writs in the sheriff's office, and an officer has a warrant in one action only, the mere circumstance of other writs being in the sheriff's office, will not authorise him to detain the party arrested on all the writs, without having warrants on all. He might, perhaps, keep him for a reasonable time, to inquire what writs there were in the office. I do not, however, give any decided opinion that he might. It is quite clear the officer cannot detain without authority from the sheriff, and the sheriff, in this case, is prevented from giving that authority, by the plaintiff appointing special bailiffs. Then the general rule applies, that when a person appoints his own bailiff, the sheriff is discharged from all responsibility. It is perfectly true, that if a special bailiff arrests a party, and delivers him over to the actual custody of the sheriff, then the special authority of the bailiff ceases, and the sheriff is responsible for the safe custody of the debtor, after he has once received him into his custody; but that was not the case here. The custody in this case was only constructive, not actual. The debtor never was in

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the actual custody of the sheriff, and having appointed special bailiffs, it is not for the plaintiff to say the debtor was in the sheriff's custody.

COLERIDGE J.—With regard to the first point, whether *Bateman* became the special bailiff of the plaintiff, I should say he did. I see very little reason to say more, and I should not have said more, if reference had not been made to the case of *Balson v. Meggat (a)*. Whether that case is right or wrong, it seems to me distinguishable from the present case. I had no intention, in that case, of going further than the circumstances of the case required. It is well known, that there is frequently an understanding between the under-sheriff and an attorney, that the writs which come from his office shall be executed by particular bailiffs, in whom the attorney has confidence; but the attorney never intends, by so doing, to relieve the sheriff from the responsibility of employing his own officers, and *Balson v. Meggat (a)* was decided with reference to that practice. In this case it seems to me, looking at the plaintiff's letter, and the evidence in the case, that *Bateman* and *Mee* were appointed the special bailiffs of the plaintiff. Now, that being so, I take the rule of law to be quite clear, that so long as the agency of the special bailiff continues, the sheriff is not liable for what takes place. The question therefore here is, whether at the time the escape took place (it is called an escape) the agency of *Bateman* to the plaintiff had ceased, and in my opinion it had not. It was said that at the time of the arrest *Dickenson* was constructively in custody at the suit of the plaintiff; that having come into the custody of the sheriff at the suit of *Rennie*, he was, in point of law, as much in his custody on the writ at the suit of *Ford*, as if he had been actually arrested on that writ, and that then there was an end of the agency on the part of *Ford*. No doubt, in certain circumstances of actual arrest and delivery into the custody of the sheriff, or an

(a) 4 Dowl. P. C. 557.

arrest by a general bailiff, the arrest in one suit is an arrest in all suits in which writs have been left in the sheriff's office. That is a point established by a great many cases, but the question is, whether the rule applies to this particular case. In order to see that, and in order to see whether the plaintiff can avail himself of it, I do not know there can be a fairer criterion than that put in the argument. Suppose *Dickenson* had been actually arrested at the suit of the plaintiff by *Mee*, who had afterwards allowed him to escape, would the agency of *Mee* to the plaintiff cease on the arrest, and the sheriff be liable for the escape? Surely he would not. If not in that case he cannot be in the present. If strict law relieves the sheriff from responsibility, justice requires it. Suppose this case—that the plaintiff, in a case in which a large sum of money was at stake, having confidence in a particular bailiff, requests the sheriff to employ him, and a writ then comes to the sheriff from another party for a small sum of money and the warrant is issued to a particular bailiff, not one in whom the plaintiff has confidence, but another, who makes the arrest, then, according to the doctrine contended for, of a constructive arrest, the officer in whom the first plaintiff had not confidence would be the person on whom he must rely for the execution of the writ.

Rule discharged.

JONES v. RICHARDS and others.

Wednesday,
May 3d.

REPLEVIN. The defendants made cognizance, first, as the bailiffs of *Elizabeth Davis*, of the taking of the plaintiff's sheep and lambs as a distress, and prescribed for a right of common in the occupier of Blaenmeryn to have common of pasture in, upon, and throughout a certain piece

Where a party is possessed, as appurtenant to a messuage, of the sole right of pasturage for sheep on a common, he

has no right to feed there the sheep of others, taken "on tack;" therefore on an issue as to such a right of pasturage in the plaintiff, evidence of his having depastured there, unmolested, the sheep of others, taken "on tack," though admissible, is not evidence of the right, as it tends to shew a usurpation only.

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of land called *Llechweddcarrgddio*, for all his sheep and lambs levant and couchant in and upon *Blaenmeryn*, at all times of the year, and because the said sheep, &c. were doing damage, &c., so that the said *E. Davis* could not have her said common of pasture in so ample a manner &c., the defendants took them. The defendants made cognizance, secondly, as above, and prescribed for the occupiers of *Blaenmeryn* to have the sole and exclusive right of pasture and feeding of sheep and lambs in and upon a certain piece of land, called *Llechweddcarrgddio*, as to the said *Blaenmeryn* belonging and appertaining.

Pleas in bar:—first, to the said cognizance, traversing the right of common in the occupiers of *Blaenmeryn*; second, that the plaintiff, as the occupier of a messuage, called *Tycock*, for the last thirty years before the commencement of the suit, and before the time when &c., had enjoyed, without interruption, common of pasture upon *Llechweddcarrgddio* for all his sheep and lambs levant and couchant upon the said messuage, called *M.*; wherefore he, the said plaintiff, put the said sheep and lambs in the declaration mentioned, on &c.; concluding *de injuriâ*. There were similar pleas to the second cognizance.

Replication to the first and third pleas in bar, similiter; to the second and fourth, a traverse.

The first trial of this cause, before *Williams J.*, at the Cardigan spring assizes, 1835, lasted three days, and the jury found a verdict for the defendants, but found also that they were entitled to the soil in the locus in quo. As this finding did not support the issues, a new trial was directed. At the second trial, before *Coleridge J.*, at the Cardigan spring assizes, 1837, a great mass of evidence was adduced on both sides; but as it appeared that the claims to common of pasture for sheep levant and couchant could not be supported on either side, the struggle was confined to the issue on the plaintiff's exclusive right of pasture on the locus in quo. In support of this right, the defendants proved, that for many years past the occupiers of *Blaenmeryn* had been

accustomed to take in the sheep of others on tack, to depasture Llechweddcarregdio, and that they had done this with the knowledge of and unmolested by the plaintiff. The learned judge, in summing up to the jury, directed them to lay this evidence out of consideration, as it did not maintain the issue of the defendants having the exclusive right of pasturage on the locus in quo, but looked rather like a usurpation. The jury found for the plaintiff.

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Chilton, on a former day in this term (a), moved for a new trial, on the ground of misdirection. The evidence withdrawn from the jury was of a most important character. It showed a user by those in whom the exclusive right of pasturage existed. Where there is an exclusive right of pasturage for sheep and lambs, it is immaterial whether the sheep belong to the party prescribing or to another. Prescription for common appurtenant is totally different from a prescription for cattle levant and couchant, in which case the numbers are of the essence of the grant (b). This being so, when it is shewn that a party had taken in sheep on tack, unmolested by any one, the inference is irresistible that he had a right of exclusive pasturage.

He also moved on the ground of the verdict being against the weight of evidence.

LORD DENMAN C.J.—I think, on the latter ground, there is no reason for disturbing the verdict, with which my brother *Coleridge* expresses himself satisfied. On the former point some consideration is required.

Cur. adv. vult.

LORD DENMAN C.J. on this day delivered the judgment of the Court:—In this case Mr. *Chilton* moved for a rule

(a) April 21st, cor. Lord Denman C.J., *Patteson* and *Coleridge* Js.: *Littledale* J. was absent.

(b) See *Bowen v. Jenkins*, 2 Nev. & Per. 88.

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for a new trial on several grounds, which we disposed of on the motion; and we took time to consider the following. The issue on which the cause turned was, whether the defendant *Richards*, occupier of a farm called *Blaenmeryn*, was entitled to the sole exclusive right of pasture and feeding of sheep and lambs on the locus in quo, as appertaining to that farm. In support of this right, the defendant, on the trial, gave important evidence of feeding the sheep of other persons, which he had taken in on tack; and the learned judge, commenting upon this evidence in his summing up, stated to the jury, that although they ought not to dismiss it from their consideration, because, whether lawful or not, it might be very cogent to prove the existence of the right claimed, yet it did not appear to him that it could properly be considered as done in the exercise of that right; that even if the right existed, the tacking appeared to him to have been a usurpation upon the lord's grant; for as that extended only to the exclusive feeding of sheep and lambs by the occupier of *Blaenmeryn*, as appertaining to his farm of *Blaenmeryn*, the lord had reserved to himself all other modes of enjoying the produce of the land, and was entitled to eat by the mouths of beasts or horses whatever the sheep and lambs on *Blaenmeryn* did not consume. It was contended, and we think with justice, that this mode of characterizing the evidence was calculated to weaken its due effect upon the jury, if it were entitled to be considered as a lawful mode of exercising the right; and the question therefore which we desired to consider was, whether the learned judge was correct in the construction which he put upon the right claimed in this record;—and we are of opinion that he was.


The prescription alleged in this case is of so unusual a kind, that no decision precisely in point was mentioned in moving for the rule, nor have we, upon search, found any. But several cases in which the Courts have had to consider claims to common by custom or prescription, furnish principles on which we may safely decide this. We refer to

Potter v. North (a), *Hoskins v. Robins* (b), and the cases collected in the notes there. The principle seems to be, to ascertain the extent of the rights conferred, and the rights reserved, by the grant; and to see whether the act be in derogation of the latter. By the terms of this prescription the grantee's right is limited to the feeding of sheep and lambs. This would be wholly insensible if the entire pasturage were granted to him in exclusion of the lord. Further, the right to feed by sheep is not limited by number, so as to make it indifferent to the lord by whose sheep the pasturage is enjoyed; but it is a grant to the occupier of Blaenmeryn, and is appurtenant to that farm. Some interest in the pasturage therefore being reserved to the lord, the questions are, what is that interest? and, is the tacking relied on in derogation of it? It appears to us the most reasonable conclusion, from the premises, that the lord's interest is in the consuming, by the mouths of his cattle and horses, whatever is not required for the sheep and lambs levant and couchant on Blaenmeryn. The appurtenancy to a particular farm is not in itself equivalent to levancy and couchancy, nor do we rely on it as such. Our conclusion is drawn from the language of the whole prescription; and upon this it appears to us that the tacking sheep is injurious to such right. The evidence in the cause, we may mention, served to shew the reasonableness of the grant thus construed. It appeared, on the one hand, to be favourable for the sheep and convenient to the owner to have the exclusive enjoyment of certain spots at certain seasons of the year, and on the other, that there was, beyond that which was required for the sheep, profitable pasture for cattle. There will therefore be no rule.

Rule refused.

(a) 1 Wms. Saund. 350.

(b) 2 Wms. Saund. 324.

1837.

 JONES
 v.
 RICHARDS.

1837.

*Friday,
May 5th.*

Want of effects in the hands of the acceptor excuse the indorsee of an accommodation bill of exchange from presenting it for payment, as well as from giving notice of dishonour to the drawer.

TERRY and others v. PARKER.

ASSUMPSIT on a bill of exchange. The declaration stated, that defendant, on 16th May, 1836, made his bill of exchange, directed to one *John Twist*, and directed *Twist* to pay to the defendant or his order 232*l.* six months after date, and the defendant then indorsed the bill to one *K.*, who indorsed it to plaintiffs. Averment, that at the time of making the bill until and at the end of the day on which the bill became payable, the defendant had not in the hands of *Twist* any effects for the payment of the bill, nor had the defendant any reasonable grounds to expect *Twist* would pay the said bill upon presentment, nor had the defendant sustained any damage by reason of the bill not having been presented on the day when the same became due, or by not having notice of the bill having been presented upon the day when the same became due, and being dishonoured, or by not having notice of presentment and non-payment until hereinafter mentioned. Averment, that on the 21st November, 1836, the said bill was presented to the said *Twist*, and the said *Twist* refused to pay the amount, and the whole amount is still unpaid; that after the said presentment and refusal, and before the commencement of the suit, the defendant had notice of the presentment and non-payment of the bill. The second count stated, that the defendant, on 16th May, 1831, made his bill of exchange, and directed the same to one *Twist*, (as in first count.) Averment, that defendant, when he so made the said bill, then dated the same in so negligent and careless a manner, and in a manner so likely to make any one reading the bill to suppose that the said date was not the 16th, but the 18th May; that by and through the negligent, careless and misleading manner in which, &c. the holders of the said bill were misled, and supposed the said bill to be dated on the 18th May, and did not present the bill when the same became

due, but presented it on the 21st November, on which day the same bill would have become due if the date of the said bill had been on the 18th November. Averment, that *John Twist* would not pay on such presentment.

Pleas—to first count,—1. that defendant did not indorse to *K.*: 2. that *K.* did not indorse to the plaintiffs: 3. that one *Pullen*, at the time of making the said bill, was liable to the defendant in the amount specified in the said bill, and there were mutual accounts between *Pullen* and *Twist*, and *Twist* requested the defendant to draw and *Twist* to accept the said bill on account of the said liability; whereupon the defendant, believing the said bill would be paid when due, if duly presented to *Twist*, made the said bill, &c. Averment, that the bill was not duly presented, and that the defendant, by reason of the non-presentment, was not liable: 4. that defendant had effects in the hands of *Twist*: 5. that *Twist* accepted for good consideration. Pleas—to second count, 1 and 2 similar to the pleas to the first count: 3. traversing that the date was made in a manner likely to mislead.

Replication to the 3rd plea to the first count, that *Pullen* was not liable to the defendant, and that the defendant did not make or *Twist* accept the said bill upon account of a liability from *Pullen* to the defendant, nor did the defendant make the bill upon the credit of the said acceptance of *Twist*, modo et formâ: to the 4th and 5th pleas, a similar traverse.

At the trial at the Yorkshire spring assizes, before *Alderson B.*, it was conceded that presentment of the bill had not been made on the proper date, the 19th November, and there was no proof of its having been presented afterwards; but it was contended that on the evidence it appeared to be an accommodation acceptance by *Twist*, and therefore presentment was unnecessary. The verdict passed for the plaintiff.

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TERRY
v.
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Cresswell, on a former day in this term (April 20th (a)), moved for a rule nisi to arrest the judgment or for a new trial. The question is, whether presentment to the acceptor is not necessary, although the bill is an accommodation bill. It is not contended that notice of non-payment is required; for that has been decided in the negative; *Walwyn v. St. Quintin* (b); but no case has ruled that a bill need not be presented when due. The only case where the question was discussed is *De Berdt v. Atkinson* (c), and there the inclination of the Court was, that an accommodation bill must be presented. The reason is obvious; the drawer is entitled to the chance of the bill being paid by the acceptor. Here *Twist* had been accommodated; and it was not at all unlikely that he would pay the bill when due. It has been often lamented that any departure has been made from the rule of law in favour of accommodation bills. The custom of merchants requires a bill to be presented when due, and the obligation of the drawer only arises on its being dishonoured by the acceptor. It is quite a different question whether notice of non-payment need be given, as in *Walwyn v. St. Quintin* (b) and *De Berdt v. Atkinson* (c), because the situation of the drawer is not changed by the non-payment of the acceptor. [*Patteson J. De Berdt v. Atkinson* (c) is against you as far as it goes, because there there was a presentment on the second day, which the Court held to be sufficient. That case also seems to suppose that in a case of insolvency presentment is not necessary; but that is not so (d). Lord Denman C.J. There is a case in 18 *Ves. jun.* (e), in which it was held that the bankruptcy of the acceptor did

(a) Before Lord Denman C.J., *Patteson and Coleridge Js.: Littleale J.* was absent from a domestic affliction.

(b) 1 B. & P. 652.

(c) 2 H. Bl. 336.

(d) See *Esdaile v. Sowerby*, 11

East, 114; *Bowes v. Howe*, 5 Taunt. 30.

(e) *Boulbee v. Stubbs*, 18 *Ves. jun.* 21. See also *Rohde v. Proctor*, 4 B. & C. 517, and *Ex parte Rohde*, 1 Mont. & Mac. 430.

not absolve the holder from presentment.] In *Hopley v. Dufresne* (a) Lord *Ellenborough* nonsuited the plaintiff, the holder of an accommodation bill, because it had not been duly presented.

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Cur. adv. vult.

Lord DENMAN C. J., on this day delivered the judgment of the Court.—The question in this case is, whether want of effects in the hands of the drawee excuses the holder of a bill of exchange from the necessity of presenting the bill for payment, as well as of giving notice of dishonour to the drawer. Many cases establish that notice of dishonour need not be given to the drawer in such a case, and the reason assigned is, because he is in no respect prejudiced by want of such notice, having no remedy against any other party on the bill. This reason equally applies to want of presentment for payment, since, if the bill was presented and paid by the drawee, the drawer would become indebted to him in the amount, instead of being indebted to the holder of the bill, and would be in no way benefited by such presentment and payment. No case directly in point seems to have been decided. The case of *De Berdt v. Atkinson* (b) was an action on a promissory note against the payee and indorser, who had lent his name, knowing that the maker was insolvent; and it was held that he was not discharged by the note not having been presented till the day after it was due, and notice of dishonour not having been given for several days. But that case can hardly be supported, inasmuch as the defendant was not the party for whose accommodation the note was made: on the contrary, he lent his name to accommodate the maker. Neither is the case of *Hopley v. Dufresne* (a) an authority the other way; for although that was a case of an acceptance for the accommodation of the defendant, Lord *Ellenborough* nonsuited the plaintiff, because the bill was presented to the acceptor's bankers after

(a) 15 East, 275.

(b) 2 H. Bl. 336.

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banking hours; yet that nonsuit was set aside on the ground of there being evidence of a subsequent waiver; and the point, whether the drawer was entitled to object to the want of due presentment, was not determined.

It appears to us that the same reason applies to want of presentment as to want of notice of dishonour, and therefore that the same rule ought to prevail with respect to want of effects operating as an excuse; and the rule to arrest judgment must be refused.

Rule refused (*a*).

(*a*) In a note to the last edition of Bayley on Bills, 248, the same view of *De Berdt v. Atkinson*, 2 H. Bl. 336, is taken as in the above judgment. See also *Smith v. Becket*, 13 East, 187.

Friday,  
 May 5th.

The KING v. The Recorder of POOLE.

A notice of appeal against a borough rate under the Municipal Corporation Act (5 & 6 Will. 4, c. 76,) must state a grievance, or facts from which a grievance must be necessarily inferred.

A notice in the following form was held insufficient:—  
 “I, F. T., being a Burgess of the borough of P., and called upon to pay the rate or assessment hereinafter mentioned, do hereby give you and each and every of you notice, that I intend to appeal and shall appeal at the next general quarter sessions of the peace to be holden, &c., against a borough rate, at a meeting of the council of the said borough, held on &c., ordered and resolved to be raised for payment of the expenses to be incurred in carrying into effect the provisions of the Municipal Act. Dated, &c.”

MR. *Turner*, of Poole, thinking himself aggrieved by a borough rate, made by the mayor and council of that borough, gave the following notice of appeal to the parties to whom it was directed:

“I, *Francis Turner*, being a Burgess of the borough of Poole, and called upon to pay the rate or assessment hereinafter mentioned, do hereby give you and each and every of you notice, that I intend to appeal, and shall appeal, at the next general quarter sessions of the peace to be holden in and for the said borough, on the 10th of April next, against a borough rate, at a meeting of the council of the said borough, held on Monday and Tuesday, the 2d and 3d of January last, ordered and resolved to be raised for payment of the expenses to be incurred in carrying into effect

the rate or assessment hereinafter mentioned, do hereby give you and each and every of you notice, that I intend to appeal and shall appeal at the next general quarter sessions of the peace to be holden, &c., against a borough rate, at a meeting of the council of the said borough, held on &c., ordered and resolved to be raised for payment of the expenses to be incurred in carrying into effect the provisions of the Municipal Act. Dated, &c.”

the provisions of the Municipal Act. Dated this 23d day of March, 1837.

(Signed) *Francis Turner.*

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v.

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of POOLE.

“ To *Thomas Arnold*, Esq., town clerk of the said borough;  
*Thomas Arnold*, clerk of the peace of said borough;  
*Benjamin Inskip*, high constable of said borough; and  
*Robert Henning Parr*, Esq.”

The appeal was entered with the clerk of the peace, at the last April sessions, but the recorder, being of opinion that the above notice was insufficient, refused to hear the appeal. Application was then made on behalf of Mr. *Turner*, to enter and respite the appeal until the ensuing sessions, but that also the recorder refused to permit. On a former day in this term, *Bingham* had obtained a rule nisi for a mandamus to the recorder to enter continuances and hear the appeal, against which cause was now shewn by

Sir *W. W. Follett*, and *Barstow* (a). The question in this case turns upon the form of the notice. By the 92d section of the Municipal Corporation Act, (5 & 6 Will. 4, c. 76,) the town council are authorized to order a borough rate, in the nature of a county rate; and it enacts, that if any person shall think himself aggrieved by any such rate, it shall be lawful for him to appeal to the recorder, at the next quarter sessions for the borough, and such recorder shall have power to hear and determine the same, and to award relief in the premises, as in the case of appeal against a county rate. It is doubtful whether the applicant has any right to appeal at all, because the recorder is only authorized to give relief as in the case of an appeal against a county rate; the statutes relating to county rates are the 55 Geo. 3, c. 51, and the 57 Geo. 3, c. 94, and they only give an appeal to churchwardens and overseers. By the Municipal Corporation Act, there is no assessment on individuals. But the principal objection is, that the notice

First point:  
Whether notice sufficient.

(a) Before Lord Denman C. J., *Littledale*, *Patteson*, and *Coleridge* Js.

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does not either state in terms that the party is aggrieved, nor state circumstances from which it can be inferred that he is aggrieved. There are three classes of decisions on this subject, those relating to the diverting and stopping up a highway, to overseers' accounts, and to county rates. *The King v. The Justices of Essex* (a), and *The King v. The Justices of the West Riding of Yorkshire* (b), which relate to the diverting and stopping up a road, establish that the party must either state in his notice that he was aggrieved, or circumstances from which it may be inferred he was. *The King v. The Justices of Somersetshire* (c), which relates to an appeal against overseers' accounts, is consistent with *The King v. The Justices of the West Riding of Yorkshire* (b). The statute relating to an appeal against overseers' accounts, gave a right of appeal to a person having a material objection to the accounts, and the notice did state a material objection. Then as to the cases on the county rate, which are *The King v. The Justices of Westmorland* (d), and *The King v. Blackawton* (e). In both those cases the notice stated a grievance. What the legislature mean when they confine the right of appeal to the party aggrieved is, that there must be some matter which is a grievance to the individual intending to appeal. The notice merely states that the appellant is a burgess, and has been called upon to pay the borough rate. Both those circumstances may be true, and yet it does not necessarily follow that the party, individually, was aggrieved. The stopping up a highway may be considered a grievance to all the king's subjects, yet it has been held that it is not sufficient to state that a highway has been stopped, but that the appellant must shew some grievance to himself, or

Second point: state in express terms he is aggrieved.

The appeal  
ought to be  
respected.

Then it is said the recorder ought to have allowed the

(a) 7 D. & R. 658; S. C. 5 B.  
& C. 431.

(b) 1 M. & R. 547; S. C. 7 B.  
& C. 678.

(c) 7 B. & C. 681, n.

(d) 10 B. & C. 296.

(e) 10 B. & C. 792.

appeal to have been entered and respited, but there is no power for that purpose given by the Municipal Corporation Act. The former cases, on the subject of the entry and respite of an appeal, have turned on other acts of parliament. The 9 Geo. 1, c. 92, s. 8, authorizes, in express terms, the adjournment of an appeal against an order of removal. The Municipal Act contains no such words, and it may have been the intention of the legislature that an appeal against a borough rate should not be adjourned, but should be decided in the first instance. However that may be, there could be no adjournment until the Court was in the possession of the appeal, which was not the case here. In *The King v. Justices of Westmorland* (a), where Bayley J. expressed an opinion that the sessions ought either to have heard or adjourned the appeal, the Court was in possession of the appeal. Here, the appeal was not in Court. [Paterson J. In *The King v. The Inhabitants of Kimbolton* (b) we held, that the sessions have jurisdiction to respite an appeal, when it is properly lodged.]

Sir J. Campbell A.G. and Bingham, contra. The words of the act are, that any party may appeal who *thinks* himself aggrieved. Does not the notice in this case intimate that Mr. Turner thinks himself aggrieved? It states that he is a burgess, that a rate has been made, and that he has been called upon to pay that rate. No form of notice is prescribed by the act, nor does it require that any ground of appeal should be set out in the notice. Surely the statement by the party that he ought not to be called upon to pay, is equivalent to saying that he thinks himself aggrieved. *The King v. The Inhabitants of Essex* (c), and *The King v. The Justices of the West Riding of Yorkshire* (d), turn on the Highway Act, and the statutes relating to the diversion of highways gave the right of appeal only to the person

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(a) 10 B. &amp; C. 326.

&amp; C. 431.

(b) *Ante*, 606.

(d) 1 M. &amp; R. 547; S. C. 7 B.

(c) 7 D. &amp; R. 658; S. C. 5 B. &amp; C. 678.



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actually injured or aggrieved. In those two cases, there was nothing in the notice to shew that the party appealing was not a mere stranger. As to the cases of *The King v. The Justices of Westmorland* (a), and *The King v. Blackston* (b), the words of the act, upon which those cases were decided, differ from the words of the present act.

The recorder was bound to receive the appeal; *The King v. The Justices of Wilts* (c), *The King v. The Justices of Westmorland* (a). He might undoubtedly have used his discretion as to the adjournment. In the present case, however, he did not use any discretion. He refused to receive the appeal.

*Cur. adv. vult.*

Lord DENMAN C. J., on June the 6th, delivered the judgment of the Court, as follows:—We have given a good deal of attention to this case, and were unable for some time to arrive at the same conclusion. We are however at length all agreed, that the meaning laid down by Lord Tenterden and Bayley J., in the cases cited, is that which ought to be applied. We therefore think that as the notice of appeal does not state any grievance or grounds from which a grievance may be necessarily inferred, the rule must be refused. I confess it is with some hesitation on my part, but still I must say it is very easy for a party who is aggrieved by a rate, and who wishes to appeal, to state the grounds of complaint in his notice.

Rule discharged.

(a) 10 B. & C. 226.

(b) 10 B. & C. 792.

(c) 2 M. & R. 401; S. C. 6 B. & C. 380.



1837.

Friday,  
May 5th.

## WRIGHT v. ACRES.

**ASSUMPSIT.** The declaration contained two counts; the first stated that the defendant was indebted to the plaintiff in 10*l.* for instruction; and the second, that he was indebted in 10*l.* on an account stated. Pleas: first, non assumpsit; second, to the whole declaration, that the defendant paid to the plaintiff divers sums of money, amounting to a large sum, to wit, the sum of 10*l.*, in full satisfaction and discharge of the promises in the declaration mentioned, and of all damages sustained by the plaintiff by reason of the non-performance thereof, which said monies the plaintiff then received in full satisfaction and discharge. The third was a plea of infancy. The plaintiff, before the trial, entered a nolle prosequi to the second count. At the trial, before the under-sheriff of Middlesex, a verdict was found for the defendant for 10*l.*, on the issue on the plea of payment and satisfaction. *Erle* subsequently obtained a rule nisi to enter up judgment non obstante veredicto, on the ground that a plea of payment of 10*l.* in satisfaction of 20*l.* was bad.

*Cleasby* now shewed cause against the rule. The record must be looked at as it stood at the time of trial. By the nolle prosequi the plaintiff had removed one of the counts from the declaration, there was therefore then a claim in the declaration of 10*l.* only, and a plea of payment of 10*l.* in satisfaction of that sum.

It is not however to be assumed that the plaintiff proved more than damage to the extent of 10*l.* The jury by their verdict have found that 10*l.* was paid and accepted by the plaintiff, in full satisfaction and discharge of the damages sustained by the breach of promise in the declaration. If the plaintiff proved that he had sustained damage to a greater amount than the defendant proved he had paid, and the under-sheriff, under those circumstances, had

A declaration in an action of assumpsit contained two counts, the former for 10*l.* for instruction, the latter for 10*l.* on an account stated; damages were laid at 20*l.* The defendant pleaded, 1st, non assumpsit; 2dly, payment of 10*l.* in satisfaction of the promises and of the damages sustained by the non-performance thereof. The plaintiff, before the trial, entered a nolle prosequi to the second count. At the trial, the defendant had a verdict on the plea of payment. It was held, that the record must be looked at at the time of trial, and not when the pleas were pleaded, and that therefore the plaintiff was not entitled to judgment non obstante veredicto, on the ground that payment of a smaller sum was pleaded in satisfaction of a larger.

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 v.  
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directed the jury to find a verdict for the defendant, he would have misdirected them. The effect of a verdict is stated in the notes to *Stennel v. Hogg* (a). It is there laid down, that where "there is any defect, imperfection, or omission, in any pleading, which would have been a fatal objection on demurrer, yet if the issue joined be such as necessarily required on the trial proof of the facts, so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given the verdict, such defect, imperfection, or omission, is cured by the verdict by the common law." It is not to be presumed in this case, that the under-sheriff misdirected the jury.

*Erle*, in support of the rule. A smaller sum cannot be paid in satisfaction of a larger; the record must be looked at, at the time the plea was pleaded, and as it was a plea of 10*l.* in satisfaction of 20*l.* it was bad; *Thomas v. Heathorne* (b). If this plea is to be esteemed a good plea, the plaintiff could not recover more than 10*l.*

LORD DENMAN C. J.—I have no doubt that the record must be looked at as it stood at the time of trial.

PATTESON J.—I am of the same opinion. The issue at the trial was only as to the first count.

COLERIDGE J. concurred.

Rule discharged.

(a) 1 Wms. Saund. 227, n. (1). (b) 3 D. & R. 647; S. C. 2 B. & C. 477.

1837.

MOUNSEY v. DAWSON and another.

Friday,  
May 5th.**THIS** was an action on the case for a wrongful distress.

The fourth count was for distraining the goods of the plaintiff, and for detaining and selling them after the plaintiff had replevied them, and the sheriff of Cumberland had allowed the replevy. The second plea to the fourth count was, that the land on which the distress was taken was part of the land of Derwent Fells, which is parcel of the lordship and honor of Cockermouth, of which the Earl of *Egremont* is seised in fee, who is also lord of the manor of Derwent Fells, and that the earl has an immemorial right, without the interruption, columny or impediment of our Lord the King, to have cognizance of pleas and plaints in replevins in the courts of the respective manors and lordships, there to be holden, from three weeks to three weeks, by plaints in the said courts to be instituted, and upon such plaints to replevy and to grant deliverance of goods or cattle wrongfully taken as a distress within the said honor, whereof complaint has been made in the said courts that such goods and cattle have been wrongfully detained, in like manner as the sheriff of the county had in his county before the 52 *Hen. 3*, and that no sheriff or other officer of the King may enter within the precinct or honor of the lordship, to perform any office or execution there, except in default of the bailiffs there, and that by writ of non omittas. That a court baron of the manor of Derwent Fells has been held immemorially, from three weeks to three weeks, at which plaints in replevin may be instituted. By means whereof the right of granting replevins belongs to the earl, who has not made any default of replevin. That the sheriff of the county did not require the earl or his steward to replevy the goods, and that the goods and chattels were not replevied by any authority, except by the sheriff, out of his county court, wherefore the defendants sold the goods which had been lawfully distrained.

1. Where the lord of a franchise has the prescriptive right to grant replevins in the same manner as the sheriff had before the statute of Marlbridge, the sheriff has no concurrent jurisdiction with him.

2. In an action on the case for selling goods which had been replevied, the declaration ought to contain an averment that the defendant knew that the goods had been replevied.

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v.  
DAWSON.

The replication admitted the seisin of the earl, and replied *de injuriâ* to the rest of the above second plea.

At the trial before Lord *Abinger* C. B., at the Cumberland summer assizes, in 1835, a verdict was found for the defendants, but the damages were assessed at one shilling, in case the Court of King's Bench should be of opinion that the plaintiff was entitled to judgment *non obstante veredicto*. In Michaelmas term, 1837, *Alexander* obtained a rule nisi to enter up judgment for the plaintiff *non obstante veredicto*, on the ground that the Earl of *Egremont* had no right to grant replevins, but that that right was vested solely in the sheriff.

*Cresswell* and *W. H. Watson*, in Hilary term last, (Jan. 26th,) shewed cause against the rule (a). The earl had authority, as lord of the honor, to grant a replevin in this case. It appears that from time immemorial the lord of the honor had the exclusive right of granting replevins. Before the statute of Marlbridge, the sheriff had no power to replevy goods impounded within any liberty which had the return of writs. In case of a writ sued out of the superior Courts, the sheriff could only make his warrant to the bailiff to make deliverance. In *Coke's Second Institute* (b) it is said, "when the beasts or other goods were distrained or impounded, within any liberty that had return of writs, the sheriff was driven to make a warrant to the bayly of the liberty to make deliverance." By the statute of Marlbridge, the sheriff is empowered to grant replevin of goods distrained in any liberty, when the lord or bailiff of the liberty makes default. But here there has been no default on the part of the bailiff. Independently of the statute of Marlbridge, the sheriff has no authority to take a plaint out of court. It was contended, when the rule was moved for, that the sheriff has a right to grant a replevin within the liberty of the court of the lord, without any writ con-

(a) Before Lord Denman C. J., *Heddale* J. was absent from illness.  
*Williams* J. and *Coleridge* J. Lit- (b) 2 Inst. p. 139, c. 21.

taining a non omittas clause, and without any default on the part of the lord; and it was said, that although the sheriff might render himself liable to an action, yet what he did would not be void. The sheriff has authority, as an officer of the superior Courts, to execute writs, and where it is necessary to execute a writ within a liberty, the bailiff of the liberty acts as his servant. But independently of his being the officer of the Court, whose duty it is to execute writs, he has no inherent authority to grant replevins; *Villa de Darby v. Foxley* (a), *Comyns' Digest*, Retorn (A), *Newland v. Cliffe* (b). Assuming that the sheriff has any authority to grant replevins, independently of the statute of Marlbridge, it could only be in his own court. But the statute of Marlbridge was passed for the purpose of enabling the sheriff to enter a franchise, when the bailiff made default in replevying the goods distrained; *Fitz. Nat. Brev.* (c). It conferred no unlimited authority on the sheriff to grant replevins where the distress was made within a liberty. It only gave him authority on the default of the bailiff or lord, and the plea alleges that there has been no default. It was said, when this rule was moved for, that as the lord's court was only held from three weeks to three weeks, it is not in the same situation to afford a remedy for a wrongful distress as the sheriff's court, and as there would frequently be a failure of justice if it have jurisdiction, that it could not be held to exist, and for this *Chapman v. Wish* (d) was cited. In that case a replevin had been brought in the Court of Common Pleas, and the chancellor and the scholars of the university of Cambridge claimed cognizance. It was certainly urged in that case, that an inferior court cannot have cognizance of a cause, "where those of a franchise cannot give equal justice to the party which he may have from the King's Courts;" and it was said by *Eyre C. J.*, that the court of the chancellor and scholars of Cambridge could not grant a second deliverance. In the first place, there

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(a) 1 Rolle's Rep. 118.

(b) 3 B. &amp; Ad. 630.

(c) 157, 158, edit. 1755.

(d) Fitzgibbon, 143.

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was no decision on this point in that case, but the case was decided on the ground that the cognizance had been uniformly claimed; in the second place, it is by no means clear that the lord of a franchise might not grant a writ of second deliverance. *Brooks' Abr. Conusans*, pl. 23. But assuming that a lord of a franchise cannot grant a writ of second deliverance, it does not follow that the sheriff may enter into the liberty in the first instance. Until within a very recent period, the courts palatine could not give the same effectual process as the courts at law. In *Wilson v. Hobday (a)*, the jurisdiction of the mayor of a city to grant replevins was distinctly recognized, although there was a sheriff of the same city. It is evident that by the statute of Marlbridge, the legislature did not intend to take away any jurisdiction in the lord of a franchise, because the sheriff is only to enter where the bailiff of the lord refuses to execute his commands. *Hallett v. Birt (b)* was cited.

(a) 4 M. & S. 120.

(b) Lord Raym. 218. *Hallett v. Birt* is reported in several books. The following is an account of the case given in Viner's Abridgment (tit. Replevin, pl. 8, vol. xix. 21), which shews the difference between the several reports:

"In trespass for taking, &c. the defendant justified that the place where &c., was a hundred, and time out of mind had a court of all actions, replevins, &c. grantable in or out of court, and that a replevin was granted to him by the steward out of court, virtute cujus, &c. The question was, if good or not, and the reason of the doubt was, because the county court could not hold plea in replevin at common law, but were enabled by the statute, which extends not to the hundred court, which is a court derived out of the county court. But per tot. Cur.

clearly, supposing that they may grant them in court, yet they cannot prescribe to grant them out of court; 2 Salk. 580, pl. 1; Hil. 8 Will. 3, B. R.; *Hallett v. Birt*, 12 Mod. 190; S.C. Pasch. 9 Will. 3; accordingly, and per Cur. suppose the hundred court might hold plea of replevin, which is hard to imagine, yet it must be as a court, and asked how a thing can be grafted on a prescription which had its original by act of parliament, and gave judgment for the plaintiff; Skin. 674, S.C., adjudged for the plaintiff. Because the defendant having shewn the property in a stranger, the plea amounts to a general issue, and though a hundred court may hold plea in replevin, this ought to be in court, and not out of court. S.C. 5 Mod. 252, accordingly; and per Cur., it is true all these courts do hold plea in replevins, but it is illegal, for the party ought to go to the sheriff

That case only shews that where there is a prescriptive right to grant replevins, the lord of the franchise cannot grant them by plaint out of court. The statute of Marlbridge only gives that power to the sheriff. All the cases however admit that a prescriptive right did exist in the lord of a franchise before that statute. There is nothing in the statute which takes it away. If the sheriff had a right to grant replevins, still the plaintiff has no right of action for selling the goods replevied. The plaintiff may have a writ of second deliverance. If the goods have been removed out of the liberty, and an elongata be returned, he may have process of *withernam*.

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*Alexander and Wightman*, contra. The answer to the last point is, that the defendants sold the plaintiff's goods after notice that they were replevied by the sheriff. If the replevin was wrongful, it is clear that the plaintiff has a good cause of action against the defendants. The question therefore is this, whether the sheriff's authority to grant replevins is done away with by the franchise of the lord. It is contended that it is not. Where there are two courts, the one existing by prescription, the other at common law, and the legislature gives additional facilities to the latter to

for the purpose, whose court is in nature of a court baron: therefore this custom was held to be void as against law and reason. And so the plaintiff had judgment, the plea being naught. Carth. 380, S. C., says, it was agreed that the hundred court and other courts of lords of manors may, by prescription, hold plea in replevin, and so may incidentally have power to replevy goods or cattle taken, but that must be by process of the court after a plaint entered, but not by a parol complaint out of court. Lord Raym. Rep. 219, Pasch. 9 Will. 3, S. C., says, that

after several arguments at the bar, it was resolved that since the sheriff could not replevy by plaint at the common law, but by writ only, and that in his county court; the hundred court, which derives its authority from the county court, cannot do it by prescription. And the statute of Marlbridge does not extend to the hundred court; therefore this replevin, granted out of this court, is ill, especially being granted by the steward, who is not a judge of the court, and the usage in such case will not alter the law; therefore judgment was entered for the plaintiff."



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execute justice, and the former has not the same facility of doing justice, but there would be a failure of justice if it were allowed to exist, the former is ousted of its jurisdiction. The sheriff has had great facilities given to him by the statute of Marlbridge, which was passed for the very purpose of enabling him to enter a liberty without a non omittas clause. He only can grant replevins out of court. By the statute of Westminster the first, the sheriff is authorized to break open doors to make deliverance of cattle distrained. To the sheriff only can a writ of second deliverance be directed. By the statute of the 1 & 2 Philip & Mary, he may appoint deputies in his county court to take replevins. The lord of this franchise can only hold his court from three weeks to three weeks, and he can only grant replevins in court. It might therefore happen that the goods distrained would be sold before the court was held. The lord cannot execute a writ of second deliverance; nor can he appoint a deputy. As the king's subjects cannot have complete justice in the lord's court, they cannot be compelled to sue there alone. In *Sir Thomas Draper v. Dr. Crowther* (a), it is laid down, that conuzance of pleas is never to be allowed unless the inferior jurisdiction can give remedy. *Chapman v. Wish* (b) is an authority for the plaintiff; for although that case was decided on the ground that the cognizance was informally claimed, yet the language of the judges is in accordance with the objections which have been made to the exercise of this jurisdiction by the lord of the franchise. *Bacon's Abr. Courts*, D. 3 (c), *Comyns' Digest*, Courts, (P 3) and *Bacon's Abr. tit. Replevin* (d), are also authorities for the plaintiff. *Wilson v. Hobday* (e) is no authority for the defendants, as in that case it was simply held that it was not ground for special demurrer to a declaration, in an action by the assignees of

(a) 2 Vent. 362, 363.

(b) Fitzgibbon, 153.

(c) 2 Bac. Abr. 393.

(d) See also Viner's Abr. title Conuzance (B), pl. 2, 3, and note.

(e) 4 M. &amp; S. 120.

a replevin bond against one of the sureties, that it did not shew a custom for the mayor to grant replevin and take bond, and did not shew that that plaint was made in court. Lord *Ellenborough*, in giving judgment, said that it was not to be assumed "that the plaint was made to the mayor out of court, if by law he could not properly take it but in court." That case does not determine that the mayor might have granted a replevin out of court.

Assuming, however, that the replevin in this case ought to have been granted by the lord of the franchise, and not by the sheriff, yet the grant of the replevin by the sheriff was not a void act, but only voidable. Where an act is done in violation of a franchise, it is not void, but voidable. Thus, in *Fitzpatrick v. Kelly* (a), where a party had been arrested within the verge of the palace, Lord *Mansfield* held that such arrest was not void, but the person making the arrest was liable to answer to the person possessed of the franchise, which had been violated. In *Piggott v. Wilkes* (b), the sheriff had improperly arrested a party within a liberty where particular officers had the exclusive privilege of executing process. It was held that the arrest was not void; and although the sheriff might have subjected himself to an action at the suit of the bailiff of the franchise, yet that the sheriff, having arrested a party, was bound to detain him in custody. In *Jackson v. Hunter* (c) also it was held that a bail-bond, given to the sheriff of Durham under a writ issued immediately from this Court to him, was not void. The sheriff therefore may be liable to an action, at the suit of the lord of the franchise, for granting this replevin. But the replevin itself is not void; and therefore the defendants had no right to sell the plaintiff's goods after the replevin had been granted.

It is not, however, necessary to contend that the lord of the franchise had no jurisdiction. It is sufficient to shew


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(a) Cited in *Rex v. Stobbs*, 3  
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(b) 3 B. & Ald. 502.

(c) 6 T. R. 71.

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that the sheriff had concurrent jurisdiction with him. Where the defendant, by a plea, seeks to defeat the right of the sheriff to grant replevins, it is necessary for him to shew that every thing was done within the jurisdiction of a liberty. In this case it does not appear that the taking was within the exclusive jurisdiction. Before the statute of Marlbridge, the sheriff had jurisdiction to grant replevins by writ. That process was dilatory, and therefore the statute of Marlbridge authorized the sheriff to grant replevins, and required him, where the goods were impounded within a liberty, to enter that liberty upon the default of the bailiff (*a*). In this case a mandate may have gone to the bailiff. It is not denied that the owner of the goods in this case might have applied to the lord of the franchise to grant replevin, but as he found that mode would be very dilatory, he had a right to apply to the sheriff.

*Cur. adv. vult.*

Lord DENMAN C.J. on this day delivered the judgment of the Court as follows:—

This was an action on the case for various oppressive and irregular proceedings in taking a distress. There were various pleas. The jury found for the defendants on all the issues; but as to the plea pleaded to the fourth count, a rule was obtained and argued for entering judgment for the plaintiff, notwithstanding the verdict, on the ground that the plea is bad in law.

The grievance set forth in this count is, that the defendants sold the goods distrained for rent due in respect of a farm, land and premises, after the sheriff had granted a replevin of them to the plaintiff. The plea states that the farm, land and premises in which they were taken are within the honor or lordship of Cockermouth, and that Lord *Egremont*, as lord of the honor, had cognizance of pleas and plaints in replevin in courts baron of the said honor, holden from time beyond legal memory, from

(*a*) Gilbert on Replevin, 68.

three weeks to three weeks, where plaints in replevin may be instituted, with a power to replevy and grant deliverance of goods wrongfully distrained within the honor, such as the sheriff had before the statute of Marlbridge, and that no sheriff might enter the said honor except on default of the bailiff; by means whereof the right to grant replevins belonged to the lord; and that he had made no default in replevying or granting deliverance in this case: with an averment that the sheriff, before replevying, did not request the lord to replevy or grant deliverance; and that the sheriff granted the replevin out of his county court. The validity of this plea was argued in the most learned and elaborate manner, but rather, perhaps, as between the sheriff of the county and the lord of the honor, than with reference to the litigating parties. The plaintiff contended that the whole record shewed him to have been aggrieved within either the 1st or the 2nd clause of the 21st chap. of the statute of Marlbridge; the former providing that the sheriff may deliver goods taken and detained after plaint levied, if they are taken out of liberties; the 2nd, that "if the beasts were taken within any liberties, and the bailiffs of the liberty will not deliver them (*no-luerint ea deliberare*), then the sheriff, for default of those bailiffs, shall cause them to be delivered." It was said that the plea did not shew the goods to have been impounded within the honor of Cockermouth; and certainly it makes no direct allegation of that fact; but the cause of complaint being the sale after a replevin by the sheriff, it is sufficient if it shews facts by which the jurisdiction of the sheriff to grant such replevin is taken away, and that objection to the sale therefore removed. The plea alleges, in the words of the statute, a taking, i. e. a distraining within liberties. The declaration has charged no wrongful removal; and we think therefore that the place of impounding has not been made material by either party. The taking then having been within a liberty, the sheriff acquired from the statute jurisdiction to replevy in the event there described, i. e. if

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the bailiff of the honor would not deliver them, then by that defect of that bailiff, the sheriff is empowered to act. But can we say that the bailiff in this case *would not* deliver the cattle, when the plea states that the sheriff had not required him so to do? *Coke*, in his commentary on this chapter, founding himself on *Fleta's* authority, expressly says, that "in such case the sheriff ought to make a warrant to the bailiff of the liberty to make deliverance, whereunto if he make no answer, or return that he will make no deliverance, or the like, the sheriff may, by force of this statute and Westminster 1st, enter into the liberty and make deliverance." This refers to the 17th chap. of Westminster, the first which enjoins the sheriff to employ force, if necessary, for rescuing distresses improperly detained, and enacts a severe punishment against the takers; but this provision is also made to take effect "after the lord or taker shall be admonished to make deliverance to the sheriff." It seems impossible then to construe the word *noluerint* in the ordinary sense of a mere neglect or nonfeasance, when it evidently imports refusal to comply with a demand. Now in this case no demand was made; and we might propose a second question,—of what default, under these circumstances, the lord of the liberty can be deemed guilty? The statute, while it represses illegal proceedings in the owners of franchises, recognizes and preserves their legitimate rights, and it would seem hard to charge them with default where they proceed with all due diligence according to the course and practice of their courts. If, however, the incapacity to administer a remedy as speedily as the common law would by the hands of a sheriff, can be called a default, there can be no grievance in any particular instance without its being made to appear that such delay has in fact taken place. By possibility the three weeks' court might have been held immediately, and so have enabled the lord to replevy as early as the sheriff could. But those inquiries are really out of the present case, which charges the landlord with oppressive conduct in selling after replevin granted, but

does not shew that he ever had notice that it was granted. It was indeed argued that the sheriff may possibly have sent his warrant to the lord's bailiff (as *Coke* intimates he ought), consistently with the plea. This is true; but that fact cannot be inferred when it is essential towards establishing the plaintiff's case of grievance, still less should we be justified in presuming that notice, without which the sale by the defendant is blameless. The grant of a replevin is a matter exclusively between the officer who grants it and the owner of the distrained goods: if the distrainer is to be affected by it, he must receive notice that it has been done. Here then is a short answer to the plaintiff's case on the count under consideration. Perhaps his declaration was demurrable for not averring notice: the want of it might have been pleaded, and would have been a good defence. At all events, when the record fails to shew that the sheriff, who was not originally the proper officer to replevy, gave the defendant notice of his having acquired and exercised that power, the apparent right of action, whatever it may have been, vanishes from the record.

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#### Judgment for the defendants (a).

(a) Mr. Barrington, in his observations on the statute of Marlbridge, seems to think that the object of the statute was, to deprive the Lords of Courts Baron of the jurisdiction to hold replevins, which they had usurped.—*Observ. on Statutes*, p. 51.

#### THE KING v. CARPENTER.

Saturday,  
May 6th.

*CHILTON* moved for a rule calling upon the defendant to shew cause why an information in the nature of a quo warranto should not be filed against him for exercising the office of a guardian of the poor for the parish of ———. He moved upon affidavits made by the churchwardens of the parish, setting out the grounds of an undue election. *Comyn's Digest*, Quo Warranto (A), and *Rex v. Nicholson* (a), shew that an information will be granted where any new jurisdiction is exercised without authority.

A quo warranto information does not lie for exercising the office of a poor law guardian under the New Poor Law Act.

(a) 1 Str. 299.

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In a case mentioned in the judgment to *Rex v. Beedle* (a), an information was granted against a party claiming to act as a guardian of the poor of Exeter. [Lord Denman C. J. The decision in *Rex v. Beedle* proceeded on the statement of that Exeter case, by Mr. Dealtry, but the question was fully argued afterwards in *Rex v. Ramsden* (b), and the Court was there of opinion, that they could not grant an information for such an office.] The act in that case was a local act, here it is on a public act of general importance, affecting every parish in England. [Patteson J. It has been expressly decided, over and over again, that a quo warranto information does not lie against overseers (c), yet they are appointed under quite as general an act as the Poor Law Amendment Act.] The reason for that is, that there is a remedy in another place. In *Rex v. Boyles* (d) it is laid down, that a quo warranto lies for any office in which the public are interested.

The COURT (e).—We do not feel ourselves at liberty to depart from the authority of *Rex v. Ramsden* (b).

Rule refused.

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|------------------------------------------|-----------------------------------|
| (a) 3 A. & E. 467.                       | (d) 2 Ld. Raym. 1559; S. C. 2     |
| (b) 5 N. & M. 325; S. C. 3               | Str. 836.                         |
| A. & E. 456.                             | (e) Lord Denman C. J., Little-    |
| (c) See <i>Rex v. Daubny</i> , 1 Bott,   | dale and Patteson Js. Coleridge   |
| 324, overruling <i>Rex v. Goudge</i> , 2 | J. was sitting in the Bail Court. |
| Str. 1213.                               |                                   |

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THE KING v. The Churchwardens and Overseers of  
 BRIGHTON.

Creditors who  
 have advanced  
 money to a  
 parish under  
 the 22 Geo. 3,  
 c. 83, (Gilbert's

Act), are not bound to apply annually for one-twentieth of their principal money, under 43 Geo. 3, c. 110, and therefore the Court will grant a mandamus to the parish officers to pay the principal and interest, although the money had been borrowed thirty years previously, and no instalment of the principal had ever been demanded.

SIR F. POLLOCK in Hilary term last had obtained a rule, calling upon the parish officers of Brighton to shew cause why a mandamus should not issue directed to them,

commanding them to make a rate for the payment of the debt and interest due upon two several bonds of 50*l.* each, lent by *John Jacob*, deceased, in his lifetime, to the guardians of the said parish, under and by virtue of *Gilbert's* act (a).

The rule was obtained upon an affidavit of the executor of *John Jacob*, setting out, that the money was advanced in the year 1806, when the parish of Bighton joined a union formed at Winchester, under *Gilbert's* act, in order to defray the expense of building a workhouse in consequence thereof. The parish officers paid the interest upon the sum regularly till Mr. *Jacob's* death, which took place in a year or two, about which time the Winchester union was dissolved, and Bighton was annexed to another union under 4 & 5 *W.* 4, c. 76. The executors of *Jacob* having called upon the parish officers of Bighton to pay this money, payment was refused, on the ground that the debt not having been paid off within twenty years, according to 43 *Geo.* 3, c. 103, it could not now be demanded, and that payment of it would not be allowed in the overseers' accounts.

Sir *J. Campbell*, A. G., now shewed cause against the rule. This application is too late. Under *Gilbert's* act (a) charges are authorized to be made on the poor's rate, for the purpose of building poor-houses, but no limitation of time is expressed for the paying off those charges. The act provided, however, (s. 20) "that the poor's assessment shall continue at the same rate they were when such poor-house was first established under the act, until the debt so contracted, and the interest thereof, shall be fully discharged." This provision being found burdensome to parishes, the 42 *Geo.* 3, c. 74, enacted, that the guardians of any parish who had erected a poor-house might, with the consent of creditors, pay off any part of the sum borrowed, not being less than one-twentieth of the sum borrowed. And the 43 *Geo.* 3, c. 110, going further, repealed so much of sect. 20 of *Gilbert's* act as

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required the assessments to continue at the same rate, and enacted, that the assessment might be diminished from time to time, " provided always, that the guardians for the time being of every such parish shall, yearly and every half-year, pay off or provide for a twentieth part at least of any monies which shall have been borrowed for the purpose aforesaid." By this act, the interests of posterity have been provided for. The guardians are commanded absolutely to pay off one twentieth part of the sums borrowed yearly ; so that a creditor, in twenty years, is certain to have his money back. But creditors having this provision in their favour, cannot be allowed to lie by thirty years, and then to come forward with their claim. The present rate-payers have nothing to do with the debts raised so long ago, and the intention of the legislature was, that no liability should attach upon them of more than twenty years standing. It may be said that the provision is not compulsory on the guardians, but the same objection was made in a similar case from Wood Dawling in Norfolk, and overruled (*u*).

Sir *F. Pollock* *contra*. The argument of the Attorney General amounts to this, if a creditor neglects to compel the guardians to raise a twentieth of his debt at the end of any one year, he loses all. The creditor's only mode of compelling the guardians to pay, is by *mandamus* ; is he bound to come to the Court for that at the end of each year ? It is impossible that a proviso in a statute like that in the 43 *Geo. 3*, c. 110, can have that effect. Whatever obligatory force it may have upon the guardians, it could never be intended to extinguish, in such an indirect form, the debts due to individuals.

LORD DENMAN C. J.—This is an application in trust under the 22 *Geo. 3*, c. 83, section 83 of which authorizes the guardians of a parish joining a union to borrow money at interest, and to secure it by a charge upon the poor's rates

(*a*) Argued April 23d, 1836.

according to the form given in the schedule, "which charge shall continue upon the said rates until the money so borrowed, and all interest for the same, shall be fully paid and satisfied." And, in order to secure the payment of these charges, the act provides, that the poor's assessments shall continue at the same rate until the debt and the interest shall be fully discharged. The 43 Geo. 3, c. 110, repeals so much of *Gilbert's* act as requires the assessments to remain at the same rate, and then section 2, on which the question in this case turns, contains a proviso, that the guardians shall pay off yearly, one-twentieth of the money borrowed under *Gilbert's* act.

It is contended, under this proviso, that persons holding the security of a parish for money advanced under *Gilbert's* act, cannot recover any part of it when more than twenty years have elapsed without their having received any part of the principal. On full consideration, I am of opinion that that is not the effect of this proviso. I think the charge created under *Gilbert's* act is still in force, and that a provision contained in a subsequent act to that creating the charge, does not absolve the parish from a liability which it incurred by parliamentary authority. Creditors would act wisely, perhaps, in coming forward at the end of each year, to claim the twentieth part of their debts, but I think, if parliament intended that their claims should be barred by nonclaim, it would have expressed its intention in clear terms.

There is a difficulty, however, in the mode in which payment of the money raised under *Gilbert's* act may be enforced. The writ moved for requires the parish officers to make a rate for the payment of it, but the act does not authorize a rate to be made for such purpose, and it would be unjust to the rate-payers of any particular period, to make them pay for what the legislature intended should be defrayed in small portions. But as section 20 of *Gilbert's* act allows the guardians, when the principal shall be called for, to borrow it from some other person, the parish

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have the means within their reach of discharging these securities. The best mode, therefore, will be, not to make this rule absolute in its terms, but to command the parish to pay the principal and interest, and then some mode will be discovered of accomplishing it.

**LITLEDALE J.**—This money was borrowed under *Gilbert's* act, and although 43 *Geo. 3*, c. 110, s. 2, directs the guardians of the poor to pay off one-twentieth half-yearly of money so borrowed, it is not the duty of creditors to see that that is done, nor are they bound to come here for a mandamus at the end of each year. The money raised is charged upon the poor's rate, and there certainly is a difficulty how to enforce the payment, for *Gilbert's* act gives no power to make a rate.

**PATTESON J.**—It is difficult to say what was intended by these acts. One thing however is clear, that sect. 20 of *Gilbert's* act has not been repealed in terms, either expressive or implied, by either the 42 or 43 *Geo. 3*. That section enacts, that when the principal raised under the act shall be called for, the guardians may borrow it from some other person. It does not enact for what time the money may be borrowed. It would seem, therefore, that a creditor may call for his principal at any moment; if he should call it in, there is no power given to make a rate for the payment, but the money may be borrowed from somebody else for that purpose, and the fund which that act contemplated for the paying off these debts, seems to have been the surplus which it was assumed would arise from the rates. The 42 *Geo. 3*, c. 74, only provides, that the guardians may, by consent of the creditors, pay off annual portions of the money borrowed, not being less than one-twentieth; but I do not understand that to mean, that each creditor shall be paid off one-twentieth of his debt, for it goes on to enact, that if the sum to be paid shall not be sufficient to discharge one of the 50*l.* notes, the money shall remain in the hands

of the overseers until it is sufficient. So it would seem that the creditors are not to be paid off rateably, but each creditor of 50*l.* to be paid off in full. So also, the 43 *Geo. 3*, c. 110, does not say that one-twentieth of each creditor's debt shall be paid off annually, but one-twentieth of the monies borrowed; and this is very material to the present case; for it is said that the creditor should apply at the end of each year for the twentieth part of the debt. But on those words there is clearly no default in the creditor in not having made such an application, and therefore he cannot have lost his debt. How that is to be enforced is another difficulty, and our only course is, to make the rule absolute in the terms pointed out by my lord.

Rule absolute for a mandamus to  
pay the principal and interest.



Sir CHARLES IBBOTSON, Bart. and POLLARD *v.* FENTON.

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*Saturday,  
May 6th.*

THIS was an application by the plaintiffs to have two sums of money paid out of Court, which had been paid by the defendant under the following circumstances:—

The first action was brought upon a bond dated 24th January, 1827, under the hand and seal of the defendant, in the penal sum of 4000*l.*, conditioned to pay 2000*l.* and interest at 5*l.* per cent. on 24th January, 1830, and was tried at the Yorkshire Summer assizes for 1835, when a verdict was found for the plaintiffs for the penalty of the bond.

The second action was brought on an indenture of covenant, bearing date the 1st day of September, 1827, whereby the defendant covenanted to pay the plaintiffs 1000*l.* with interest at 5*l.* per cent., on the 1st November then next, and was tried at the same Summer assizes for the county of York, when a verdict was found for the plaintiffs 468*l.* 18*s.* Final judgment was signed in both actions on the 26th November, 1835.

On a motion to reverse an outlawry after final judgment, the Court will *not* impose, as one of the terms upon which they will grant the motion, that the defendant should pay interest from the time of signing final judgment to the period of reversal.

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Proceedings were taken to outlaw the defendant in both actions, and were completed on the 24th November, 1836, upon which a special writ of *capias utlagatum* was issued in each cause, which were duly executed and returned by the sheriff.

In March last a summons in each action was taken out by the defendant to reverse the proceedings to outlawry, to which the plaintiffs were willing to consent, upon payment of principal and interest up to the day of payment on the respective sums found due by the jury, with costs of suit and costs of the proceedings to outlawry. The payment of interest was objected to by the defendant. Lord *Denman* heard the parties upon the summons, when his lordship suggested that the interest on the several principal monies should be paid into Court; to which the plaintiffs assented; and thereupon his lordship ordered, that upon payment of damages and costs, as taxed on final judgment, together with costs of outlawry (without prejudice to the proceedings upon the outlawry being continued) to the plaintiffs, and upon paying the interest into Court, to abide the event of an application to the Court, such interest to be ascertained by the Master, the outlawry in each action should be reversed.

The Master ascertained the amount of interest to be paid in each action, and the plaintiffs have since received the principal and interest up to the 18th July, 1835, together with costs of the action and the proceedings to outlawry respectively.

The defendant, in pursuance of the order, paid 17*l.* 12*s.*, being the interest in the first action from 18th July, 1835, into Court, and 34*l.* 10*s.* 4*d.* into Court in the second action, for interest during the same period.

A rule *nisi* had been obtained by the plaintiffs to have the two sums of 170*l.* 12*s.* and 34*l.* 10*s.* 4*d.* paid to them; against which

*Cresswell* now shewed cause. The question for the

consideration of the Court is, whether the plaintiffs are entitled to be paid interest from the time of signing final judgment to the period of reversal, in each action. The plaintiff is not entitled to interest. The process of outlawry is merely a mode to bring a party into Court. If the outlawry proceeds upon mesne process, it is reversed upon the defendant putting in an appearance or finding bail, if the nature of the action be such as to require bail. If the party is put in exigent for not obeying the final judgment of the Court, he may reverse the outlawry, upon doing that which the exigent requires (*a*). If then a party is outlawed after final judgment given, he must either pay the debt and costs, or remain in prison. The Court has no power to impose upon the defendant the payment of interest in addition to the payment of the debt and costs. [*Littledale J.* Interest is given, when a judgment is affirmed upon a writ of error, by 3 *Hen. 7*, c. 10, which statute was confirmed by 19 *Hen. 7*, c. 20.] The practice, where the outlawry proceeds upon mesne process, shews what ought to be the practice after final judgment. [*Coleridge J.* Is not the reversal discretionary with the Court, on motion?] The statute 4 & 5 *W. & M.* c. 18, gives the right of reversal. [*Patteson J.* I think there is no act of parliament which gives a party a right to reverse his outlawry unless there be some error in the proceedings. Outlawries are only resorted to when the defendant is abroad, and then the absence of the party makes the proceeding erroneous.] By the 4 & 5 *W. & M.* c. 18, s. 3, it is enacted, that "no person outlawed for any cause, matter or thing whatsoever (treason and felony only excepted), shall be compelled to come or appear in person in Court to reverse such outlawry, but shall or may appear by attorney, and reverse the same without bail, in all cases except where special bail shall be ordered by the said Court." [*Patteson J.* That only authorized the party to appear by attorney in

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cases where he could have appeared in person(a)]. If the Court has not an inherent power to reverse the outlawry, it cannot acquire that power by obliging the defendant to pay interest. [*Patteson J.* If there is error apparent, the party has a right to reverse the outlawry, and the Court cannot impose terms.]

*J. Bayley* in support of the rule. This is an application to the indulgence of the Court, for the defendant has no right to reverse the outlawry on motion. The Court may therefore impose any terms they think proper. If the defendant will not consent to those terms, he can bring his writ of error. It is unreasonable that the defendant should profit by his delay in obeying the judgment of the Court. The matter resolves itself into this question, whether it is equitable that the defendant should pay interest? In *Viner's Abr.* title Interest, a variety of cases are collected, in which the Courts have allowed interest. It appears from *Brown v. Barkham* (b), that a judgment of a Court of Equity carries interest. In *Bann v. Dalzel* (c), it was held that interest might be recovered on a foreign judgment. There are cases in equity in which interest has been allowed beyond the penalty of a judgment, *Godfrey v. Watson* (d). It is an assumption that there has been any error in the proceedings in this case.

Lord DENMAN C. J.—Undoubtedly the plaintiff ought to have interest, if it were consistent with the practice of the Court to give it to him, but the practice is otherwise. We must look upon the defendant as being in the same

(a) Upon an outlawry the party outlawed was always obliged, in the King's Bench, to appear in person (Cro. Jac. 462); but in the Common Pleas he might appear by attorney, *Lee v. Millard*; 2 Salk. 495. The stat. of 4 & 5 Wm. &

*Mary*, c. 18, appears to have been passed to allow the party outlawed to appear by attorney in the King's Bench. *Anon.* Salk. 496, pl. 6.

(b) 1 Peere Wms. 652.

(c) M. & M. 228.

(d) 3 Atk. 517.

situation as though he were now applying to the Court to reverse the outlawries for error (for we must presume that there has been error). It would then be contrary to the inveterate practice of the Court, to impose such terms as the plaintiffs now require.

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LITLEDALE J.—In *M'Clure v. Dunkin (a)*, which was an action of assumpsit on a judgment recovered in Ireland (the original action being upon a bond), Lord *Kenyon* said “ If this had been an action on a bond, the objection (namely, that interest could not be recovered upon the penalty of a bond,) would have holden good, but after judgment recovered transit in rem judicatam; the nature of the demand is altered: and this being an action on the judgment, it was competent to the jury to allow interest upon the amount of what was due.” Whether interest is recoverable, depends entirely on the nature of the proceedings. The Court, in my opinion, would depart from its usual practice, if interest were allowed in the present case. Where a writ of error is brought, and the judgment is affirmed, the statute of *Hen. 7* provides, that the party shall recover his costs and damages for the delay, and the damages have been held to include interest. The exigent in this case, was founded on a *ca. sa.* If the defendant had appeared before the outlawry was complete, he would only be required to pay the debt and costs. I have no doubt the outlawry is erroneous, and would have been reversed upon error. As the practice has been to reverse an outlawry which is erroneous, without imposing any other terms than the payment of the debt and costs, I do not think that in this case we ought to impose the additional term of payment of interest.

PATTESON J.—We cannot introduce a new practice. The course has been to reverse the outlawry, both before and after final judgment, without payment of interest.

(a) 1 East, 436, 438.



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If the outlawry was founded on mesne process, of course the payment of interest could not be required, because that would be prejudicing the question in the cause.

COLERIDGE J. concurred.

Rule discharged (a).

(a) See *Beauchamp v. Tomkins*, 3 Taunt. 141; *Hesse v. Wood*, 4 Taunt. 691.

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TYSON v. SMITH.

A custom for all victuallers to erect booths on a common, being parcel of the waste of a manor, (selected by the lord for holding fairs yearly, every fortnight,) a reasonable time before the Monday next after the feast of Pentecost, and to continue them so erected until the feast of All Souls, paying to the lord two pence, is good.

**THIS** was an action quare clausum fregit, brought by the lessee of the Earl of *Egremont*. The declaration was for breaking and entering a certain close of the said plaintiff, called *Rossley Hill*, otherwise *Rossley Fair Ground*, situate and being in the parish of *Westward*, in the county of *Cumberland*.

Pleas: first, not guilty; second, that from time whereof &c., on certain days in each and every year, to wit, on Monday next after the feast day of Pentecost in each and every year, and afterwards on each alternate Monday in each and every year, until the feast of All Souls, fairs for the buying and selling of all kinds of goods, wares and merchandizes, have been, and of right ought to have been, and still of right ought to be holden, on the commons or waste grounds of the manor of *Westward*, in the county of *Cumberland*, that is to say, on some part thereof appointed for that purpose, from time to time, by the lord of the said manor for the time being. And that from time whereof &c., there hath been, and of right ought to have been, and still of right ought to be, an ancient and laudable custom, used and approved of within the said manor, that is to say, *that every liege subject of this realm, exercising the trade or calling of a victualler, at a reasonable time before the Monday next after the feast day of Pentecost, in each and every year,*

*hath, during all the time aforesaid, been used and accustomed to enter, and of right ought to have entered, and still of right ought to enter, into and upon the part of the said commons or waste grounds of the said manor, lordship or forest, from time to time appointed for holding the said fairs, by the lord of the said manor, lordship or forest, for the time being, and for the more conveniently carrying on his said trade or calling, to erect a booth and stall, and to put and place posts and tables there, and to keep and continue the said booth, stall, posts and tables, so erected, put and placed, from thenceforth until a reasonable time after the last of the said fairs, so as aforesaid holden in each and every year. That the close in the declaration mentioned, and in which &c., at the said several times when &c., was parcel of the commons or waste grounds of the manor, lordship or forest, and before the first of the said times when &c., had been appointed by the Right Honourable George O'Brien, Earl of Egremont, the lord of the said manor, lordship or forest, for the time being, as the place for holding the said fairs, to wit, in the county aforesaid; and that he the plaintiff, at the said several times when &c., held and occupied the close in which &c., as tenant thereof to the earl, to wit, in the county aforesaid. Wherefore the said defendant, being a liege subject of this realm, and exercising the trade or calling of a victualler, for the purpose of erecting a booth and stall, and of putting and placing posts and tables there, for the more conveniently carrying on his said trade or calling, on the said first time when &c., in the declaration mentioned, being a reasonable time before the Monday next after the feast day of Pentecost, in the said year of our Lord 1830, broke and entered the said close in which &c. The third plea stated the custom as follows:—That every liege subject of this realm, exercising the trade or calling of a victualler, at a reasonable time before the Monday next after the feast day of Pentecost, in each and every year, hath, during all the time aforesaid, been used and accustomed to enter, and of right ought to have entered,*

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and still of right ought to enter into and upon that part of the said commons or waste grounds of the said manor, lordship or forest, from time to time appointed for holding the said fairs, by the lord of the said manor, lordship or forest, for the time being, and for the more conveniently carrying on his said trade or calling, to erect a booth and stall, and to put and place posts and tables there, and to keep and continue the said booth, stall, posts and tables, so erected, put and placed, from thenceforth until a reasonable time after the last of the said fairs, so as aforesaid holden in each and every year, yielding and paying therefore, to the lord of the said manor, lordship or forest, for the time being, the sum of 2*d.*, when the same should be lawfully demanded.

There were several other pleas, which it is not necessary to state. The replication traversed the custom.

At the trial, before Lord *Abinger* C. B., at the Cumberland summer assizes, in 1835, a verdict was found for the defendant. In Michaelmas term, 1835, *Blackburn* obtained a rule nisi to enter up judgment non obstante veredicto, on the ground that the custom pleaded was bad.

*Cresswell* and *Wightman*, in Hilary term, 1837, shewed cause against the rule (a). There is nothing unreasonable in the custom, as stated in the third plea. There are several cases in which customs, quite as extensive, have been upheld by the Court. In *Hix v. Gardiner* (b), a custom for all residents and inhabitants within a manor, to grind their corn at the mill of the lord of the manor, was held to be good. In *Drake v. Wiglesworth* (c) a similar custom was held good. In that case the custom was for all the householders of the parish to grind all their corn, which should be used by them in their respective houses, and to pay for the grinding thereof a reasonable toll. In

(a) Before Lord *Denman* C. J.,  
*Williams J.* and *Coleridge J.*

(b) 2 Bulst. 195.

(c) *Willes*, 654.

*Cocksedge v. Fanshaw* (a), a custom for the corporation of London to receive for their use a duty or toll of one farthing on the quarter of corn, from all persons, not being free of the city, importing corn into London, or the liberties thereof, coastwise, eastward of London Bridge, except from the cinque ports of the county of Kent, was recognized as valid. That was a custom in restraint of trade, this is in furtherance of trade, because the right is claimed against the lord. The case of *The Mayor of Northampton v. Ward* (b), which was cited when the rule was obtained, does not shew the custom bad. In that case the plaintiffs declared for a trespass committed by the defendant, in breaking and entering their close, called the Butcher Row, and erecting a stall there. The defendant pleaded that there was a public market held every Saturday in Butcher Row, for selling butchers' meat; that he entered the market with his meat in order to sell it, and for that purpose erected a stall in the open market for the necessary exposing his meat to sale. The question in the cause turned upon the validity of the plea. The Court was of opinion, that although every person has a common right and liberty of coming into a public market for the purpose of buying and selling, yet he has not the liberty of placing a stall there, but he must acquire that by a compensation to the owner of the soil, which is called stallage. In the plea in that case the defendant stated nothing except the mere fact of the existence of a market, and there can be no doubt that the mere right to attend a market does not give a right to erect a stall. In the present case, the owner of the soil is paid 2*d.*, which is given to him for the erection of the stall. *Rex v. Burdett* (c) is likewise distinguishable from the present case; that case merely determines, that if the owner of the soil of a market covers the market-place so completely with stalls, that the market people are obliged to use them, the taking money for the use of the stalls is extortion. Neither in

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(a) 1 Doug. 119.

Rep. 107.

(b) 2 Str. 1238; *S. C.* Wilson's

(c) 1 Lord Raym. 148.

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that case nor in *The Mayor of Norwich v. Swann* (a), did it appear that any sum was paid to the owner of the soil as compensation to him for excluding him from the soil. It is said here that the custom is unreasonable, because so many victuallers might resort to the fair and erect stalls, that the rest of the public might be excluded. There are many customs and privileges from which the same inconvenience might arise. Thus a custom for the inhabitants of a parish to play at games in a particular close is good. If all were to go at the same time, their object would be frustrated. A custom for fishermen to dry their nets on land adjacent to the sea is good. If all were to resort there at the same time, great inconvenience would follow; *Brooke's Abr. Custom*, 46. All the King's subjects have a right to enter a port, yet a small port would soon be filled. It is immaterial to the validity of the custom, that all the King's subjects cannot exercise their right at the same time.

*Blackburne, Armstrong, and W. H. Watson*, contra. The custom is unreasonable; first, it is too extensive in respect of the persons by whom it is to be exercised; and secondly, in respect to the mode in which it is to be exercised; thirdly, the erecting posts upon the soil amounts to pickage and stallage, which is not the subject of custom.

First, it is too extensive with respect to the persons by whom it is to be exercised. The plea claims the right for *all* victuallers. Certain acts of parliament have made provisions for exercising the business of victualler, but no such class of traders exists at common law. The custom, therefore, must be considered as applicable to all the King's subjects. In *Fitch v. Rawley* (b) it was held, that a custom for all the inhabitants of a parish to play at all kinds of lawful games and pastimes in a close, at all seasonable times of the year, at their free will and pleasure, was good. But a similar custom for all persons whatever, happening to be in the said parish, was bad: and *Buller J.* said, "How that

(a) 2 Sir W. Black. Rep. 1116.

(b) 2 H. Black. 393.

which may be claimed by all the inhabitants of England, can be the subject of a custom, I cannot conceive." The reasoning of the Court in *The Mayor of Northampton v. Ward* (a), shews that no such custom as this can exist. *Rex v. Burdett* (b) shews that if too many victuallers, in this case, resorted to the fair, and the lord received money from them, he would be liable to an indictment for extortion. In *Viner's Abr.* (c) there is the following passage, "Information in the Exchequer, against a merchant for lading wine in a strong ship; the defendant pleaded licence of the King, made to J. S. to do it, which J. S. had granted his authority thereof to the defendant, and that there is a custom among merchants, throughout England, that one may assign such licence to, and that the assignees shall enjoy it, &c. which was demurred in law, and it was agreed for law that a man cannot prescribe custom throughout England, for if it be throughout England, it is a common law, and not a custom."

Then as to the mode of enjoyment. There is no species of limit in this respect. According to the custom, as laid in the pleas, a party might have a booth so large as to exclude all others, both the lord and the public. All other claims of profits à prendre are subject to restriction. In the case of the claim of a right of common, it is necessary to aver that the cattle were levant and couchant, for there cannot be common for any number of beasts, (1 *Wms. Saund.* 28 a, note (4)). In the case of an improvement of common by a lord, under the statute of Merton, he cannot inclose the whole, but must leave sufficient for the commoners. No custom to inclose, without leaving sufficient for the commoners, would be good. In *Badger v. Ford* (d) it was holden, that a custom for the lord to grant leases for the waste of a manor without restriction is bad.

The claim amounts to pickage and stallage, which is not

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(a) 2 Str. 1238; S. C. Wilson's  
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(b) 1 Lord Raym. 148.

(c) Title Custom, 175.

(d) 3 B. & Ald. 153.

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the subject of custom. The distinction is this, a profit à prendre in the soil of another which this is, cannot be claimed by custom, but an easement may. Thus a custom for the fishermen of Kent to dry their nets on a certain field is good (a). But if in addition to this they claim a right to drive stakes into the land, it is bad. *Brooke's Abr.* title Custom, pl. 46; *Gateward's* case (b).

*Cur. adv. vult.*

Lord DENMAN C. J., in this term (May 5th), delivered the judgment of the Court, as follows:

This was a motion for arresting the judgment, where a verdict had been found for the defendant, on a plea which set up a custom for all victuallers to erect booths on the locus in quo, being parcel of the waste of a manor, selected by the lord for holding fairs yearly, every fortnight, a reasonable time before Monday next after the feast day of Pentecost, and continue them so erected until the feast of All Souls. The defendant claimed as a victualler a right to erect such booth, and keep it there during the whole period, paying 2*d.* to the lord.

The plaintiff's arguments to shew that this custom was bad in law, resolved themselves into the objection that it was too large and indefinite as admitting *all* victuallers, an undefined body, who might cover the whole land in question, to the exclusion of the plaintiff himself, and all others wishing to attend the fair, during a considerable time of the year. But in the absence of all authority, we are of opinion that the custom is good. The description of a victualler is sufficiently definite, and the attendance of that class of persons at a fair is convenient, or rather necessary, for the refreshment of those resorting to it. The exclusion of the owner from his own soil, may certainly be lawful by virtue of a reasonable custom, and the exclusion for the whole period may be necessary to induce the victualler to

(a) *Baker v. Brereman*, Cro. Car. 418. (b) 6 Rep. 60 b.

bring his booth to a spot possibly so distant, that frequent removals and re-erections might reduce his profits to nothing. And the apprehension that the resort of victuallers may be so numerous as to interfere with all others who may have business to transact at the fair, appears to us altogether unreasonable and extravagant. If it could prevail, it must indeed extinguish the fair itself, to which all traders of every class may resort for the purpose of vending their wares, while due regard to their own interest must limit their actual attendance to such a number as appears likely to have a fair chance of trading successfully.

Rule discharged.

KITCHEN v. SHAW.

**THIS** was an action for false imprisonment, in which the defendant pleaded the general issue. At the trial before Lord Abinger C. B., at the Cumberland Summer assizes 1835, his lordship, after hearing the statement of the case from the plaintiff's counsel, directed her to be nonsuited. From that statement it appeared that the plaintiff was an infant, and the daughter of a labouring man in Cumberland. She had agreed with one *Hodson* to serve him for half a year as a domestic servant. Before the period of her service expired, a dispute arose between her and her master, with respect to her wages, upon which she quitted his service. *Hodson* subsequently took her before a magistrate, who convicted her under 6 Geo. 3, c. 25, s. 3, for not performing her contract, and she was subsequently committed to prison by him. In Michaelmas term, 1835, *Cresswell* obtained a rule nisi to set aside the nonsuit, and for a new trial, on two grounds; first, that the 6 Geo. 3, c. 25, did not apply to domestic servants; and, secondly, supposing that it did apply, as the plaintiff was an infant, she could not enter into a valid contract of service.

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A magistrate has no authority, by the 6 Geo. 3, c. 25, to determine disputes between domestic servants and their masters.



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*Coltman* shewed cause in Hilary term, 1837. The 6 Geo. 3, c. 25, applies to domestic servants. The title of the act is, "An Act for better regulating apprentices and persons working under contract." The 4th section recites, that it frequently happens that artificers, calico-printers, handicraftsmen, miners, colliers, keelmen, pitmen, glassmen, potters, labourers, and others who contract with persons for certain terms, do leave their respective services before the terms of their contract are fulfilled, to the great disappointment and loss of the persons with whom they so contract. And it enacts, that if any artificer, &c., labourer or other person shall contract with any person whomsoever, for any time or times whatsoever, and shall absent himself from his service before the term of his contract shall be completed, then it shall be lawful for any justice of the peace, upon complaint made, to issue his warrant, and if it shall appear to such justice that any such artificer, &c. labourer or other person shall not have fulfilled such contract, to commit every such person to the house of correction. That act applies to every description of servants; and to give a magistrate jurisdiction, it is only necessary that the relation of master and servant exist. The words are so large and extensive, that there would have been no doubt on the subject, except for the decisions which have taken place on the 20 Geo. 2, c. 19. The language of that statute differs from the language of the 6 Geo. 3, c. 25. In the first section of the 20 Geo. 2, c. 19, authority is given to determine disputes between masters or mistresses and servants in husbandry. From that it may be collected, that the legislature intended to confine the operation of that act to the particular class of servants there mentioned. In the 6 Geo. 4, the words "servant in husbandry" are omitted, and instead of them we have the words, "other person who shall contract with any person whomsoever, for any time or times whatsoever." *Lowther v. The Earl of Radnor* (a) determined, that the words "other

(a) 3 East, 113.

labourers," in the 20 Geo. 2, c. 19, applied to all labourers. In *Branwell v. Penneck* (a), the general language of Lord Ellenborough, in *Lowther v. The Earl of Radnor*, was somewhat restricted. The reason is given in the judgment of Bayley J. in that case, who says the "20 Geo. 2, c. 19, recites, that the existing laws for payment of wages to servants, and to artificers, handicraftsmen and labourers, were defective, and then provides a mode of settling disputes between masters and certain description of persons and other labourers, although no rate or assessment of wages has been made that year by the justices of the peace for the shire, &c., where such complaint shall be made, or such dispute arise. Those words imply, that the legislature did not contemplate all labourers, but those only with reference to whom the justices had power to make a rate of wages." The language of the 4 Geo. 4, c. 34, is similar to that of 6 Geo. 3, c. 25. There are some decisions on the former act, viz. *Hardy v. Ryle* (b), *Lancaster v. Greaves* (c), *Wiles v. Cooper* (d). But in none of them has it been decided that a magistrate, in a case like the present, has no jurisdiction (e).

*Cresswell*, in support of the rule. All the statutes are part of one system of law, on the one hand to enable labourers to recover their wages, and on the other to enable the masters to oblige the labourers to complete their contracts. The stat. 5 Eliz. c. 4, is the key to the interpretation of all the statutes on this subject. It was so considered in *Branwell v. Penneck* (a). It was held in that case, that the 20 Geo. 2, c. 19, applied only to such labourers as the justices had power to make a rate of wages for, by the 5 Eliz. c. 4. The words of the 20 Geo. 2, c. 19, are as large

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(a) 1 M. & R. 609; S. C. 7 B. & C. 536.

(b) 4 M. & R. 295; S. C. 9 B. & C. 608.

(c) 9 B. & C. 628.

(d) 3 A. & E. 524.

(e) On the second point, the

following cases were cited, *Rex v. Chillesford*, 6 D. & R. 161; S. C. 4 B. & C. 94; *Gray v. Cookson*, 16 East, 13; and *Rex v. Evered*, cited in *Gray v. Cookson*, 16 East, 27.

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and extensive as the words in the 6 *Geo.* 3, c. 25. In that case it was said, by *Holroyd J.*, that if the construction which the Court put upon the statute was not correct, he did not know how it could be said that its provisions did not extend to bankers or merchants' clerks, and other persons of that description. That observation is applicable to the statute now under discussion. It could not be the intention that it should apply to bankers and merchants' clerks. It is said that the words, "other person", mean all other persons. If that were so, there was no necessity for passing the statute of 4 *Geo.* 4, c. 54. The true rule of construction is laid down by Lord *Tenterden* in *Sandiman v. Breach* (a); "where general words follow particular ones, the rule is to construe them as applicable to persons ejusdem generis." Adopting that rule, the statute in question cannot be held to apply to domestic servants, because handicraftsmen are the only description of persons mentioned in the statute (b).

*Cur. adv. vult.*

Lord DENMAN C. J., in this term, on the 5th day of May, delivered the judgment of the Court as follows:

This was an action for false imprisonment. Lord *Abinger* nonsuited on the opening of the case by plaintiff's counsel, from which it appeared that she, being an infant, complained of the defendant, a justice of the peace, for convicting her under 6 *Geo.* 3, c. 25, s. 3, for not performing her contract with a master to whom she had hired herself as a domestic servant. A new trial was moved for, and the rule granted, on the ground that to this class of servants the act did not apply; and secondly, supposing it to apply, the plaintiff's infancy was said to prevent her from entering into a contract of service.

We find it unnecessary to give any opinion on the question of infancy, because we are clearly of opinion, on the

(a) 7 B. & C. 96.

and Com. Dig. tit. *Enfant*, (B 6)

(d) Upon the other point, *Gylbert v. Fletcher*, Cro. Car. 179;

were cited.

first objection, that the defendant had no jurisdiction. The 5th of *Elizabeth* is not only confined to certain classes of servants, but it expressly excludes domestic servants. The eleventh negative qualification in sect. 4, is thus worded, "not being lawfully retained in household, or in any office with any nobleman, gentleman or others, according to the laws of this realm." If any statute in *pari materia* had been designed to do away this limitation, one should naturally expect that this would have been effected by plain words. Now the statute 6 *Geo.* 3, c. 25, entitled "An act for better regulating apprentices and persons working under contract," is introduced by no general preamble. The first clause applies a remedy to the evil therein recited; the injustice practised on several manufacturers of this kingdom by apprentices, who leave their service as soon as they become useful in it. The preamble of the 4th section is thus worded: "And whereas it frequently happens that artificers, calico-printers, handicraftsmen, miners, colliers, keelmen, pitmen, glassmen, potters, labourers, and others, who contract with persons for certain terms, do leave their respective services before the terms of their contracts are fulfilled, to the great disappointment and loss of the persons with whom they so contract; for remedy whereof be it enacted, that if any artificer (followed by the same list as before) or other person, shall contract with any person or persons whatsoever for any time or times whatsoever." Large as these words undoubtedly are, when we apply to them the ordinary rules for construing acts of parliament laid down by Mr. *Dwarris* (a), and acted upon in all times, but nowhere more clearly stated than by Lord *Tenterden* in *Sandiman v. Breach* (b), we find ourselves compelled to say, that the "other persons" are not all persons whatever who enter into engagements to serve for stated periods, but persons of the same description as those before enumerated, and that the generality of the words must have been so restricted, even though domestic servants had not been excepted from the 5th *Elizabeth*.

(a) Part 2nd, 736, 750.

(b) 7 B. &amp; C. 96.

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In the argument many cases were cited, among others *Gray v. Cookson* (a), *Lowther v. Lord Radnor* (b), *Hardy v. Ryle* (c), properly, because they are connected with the subject-matter, but not now requiring particular examination, because they have no bearing on this point. We may add, that the general opinion has been in conformity with our present decision, and that the treatises have so considered it.

We conclude then, that the defendant has acted without jurisdiction, and the plaintiff ought to have been permitted to prove her case. The rule for setting aside the nonsuit and granting a new trial must be absolute.

Rule absolute.

(a) 16 East, 13.

(b) 8 East, 118.

(c) 4 M. & R. 295; S. C. 9 B.

& C. 608.

### HITCHCOCK v. COKER (a).

1. An agreement in partial restraint of trade is not void, because the party is thereby restricted from exercising his business in a particular place for his life, notwithstanding the death of the other party; per the Exchequer Chamber, overruling a decision of the K. B.

2. A court of law will not consider the

adequacy of a consideration given for a covenant in partial restraint of trade, it is sufficient that there be a *legal* consideration, and of *some* value.

**ASSUMPSIT.** The declaration stated, that before and at the time of the making of the agreement thereafter mentioned, the plaintiff was a chemist and druggist, and had taken the defendant into his service, as an assistant in his trades and businesses, at a certain annual salary in that behalf to be paid by the plaintiff to the defendant, upon condition, amongst other things, that the defendant should enter into, and observe and perform the agreement thereafter contained. Now therefore the said defendant, in consideration of the premises and in performance of the said condition, heretofore, to wit, on the 20th day of April, in the year of our Lord 1832, by a certain agreement then

(d) This case was decided in subsequent decision of the Court of Exchequer Chamber.

Trinity term, 1836, but has been published here in order to add the

made by and between the said defendant, of the one part, and the said plaintiff, of the other part, after reciting that the plaintiff had taken the defendant into his service as an assistant, at a certain annual salary, upon condition, amongst other things, that the defendant should enter into, and observe and perform the agreement thereafter contained, the defendant did, in and by the agreement, promise and agree to and with the plaintiff, that if the defendant should at any time thereafter directly or indirectly, either in his own name or in the name or names of any other person or persons, use, exercise, carry on or follow the trades or businesses of a chemist and druggist, or either of them, within the town of Taunton, in the county of Somerset, or within three miles thereof, then that he, the defendant, his executors or administrators, should and would, on demand, pay or cause to be paid unto the plaintiff, his executors, administrators, or assigns, the full sum of 500*l.* of lawful money current in England, as and for liquidated damages. And the agreement being so made as aforesaid, afterwards, to wit, on the day and year aforesaid, in consideration of the premises, and that the said plaintiff, at the special instance and request of the said defendant, had then undertaken and faithfully promised the said defendant to perform and fulfil the said agreement in all things, on the said plaintiff's part and behalf to be performed and fulfilled, he, the said defendant, undertook and then faithfully promised the said plaintiff to perform and fulfil the said agreement in all things, on the said defendant's part and behalf to be performed and fulfilled; and although the said plaintiff hath performed the said agreement on his part and behalf to be performed, yet the said defendant hath not performed the said agreement on his part, but, on the contrary thereof, the said plaintiff saith, that afterwards, and after making of the said agreement, the defendant, in his own name, used, exercised, carried on and followed the trades and businesses of a chemist and druggist within the said town of Taunton, in the said county of Somerset, contrary to the said agreement;

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and although the said plaintiff afterwards demanded of the defendant the sum of 500*l.*, yet the defendant hath wholly neglected and refused to pay the same. Plea: non assumpsit.

At the trial before *Taunton J.*, at the Somersetshire spring assizes, 1835, a verdict was found for the plaintiff. In Easter term, 1835, *Erle* obtained a rule nisi in arrest of judgment, on two grounds; first, that the consideration for entering into the agreement was not sufficient; and, secondly, that the agreement was void, inasmuch as the restraint imposed upon the defendant was greater than was necessary for the protection of the plaintiff. In Easter term, 1836, cause was shewn against the rule, before Lord *Denman C. J.*, *Patteson J.*, *Williams J.* and *Coleridge J.*, by

*Bompus Serjt.*, and *Crowder*. The consideration for the agreement was, that the plaintiff had taken the defendant into his service at an annual salary. [Lord *Denman C. J.* intimated that they had better confine their attention to the second ground on which the rule was granted.]

The agreement was not void, as being in restraint of trade. It only restrains the defendant from exercising his trade within three miles of *Taunton*. In *Comyn's Digest* (a) it is said, "If a man, for good consideration, restrains himself from the exercise of his trade in a particular place, he shall be bound by it; as if a man, in consideration that the plaintiff would buy all the goods in his shop, promises that he will not afterwards use his trade in the same shop, or that he will not use his trade afterwards in the same street in London. So in consideration that the plaintiff bought his decayed wares at the first price, he will not use his trade afterwards in the same town in the country." In the note to the case of *Hunlocke v. Blacklowe* (b), it is said that a promise not to use a trade in a particular place is good. In *Mitchell v. Reynolds* (c) a bond, given by a baker, not to exercise his trade within the parish for the term of five

(a) Tit. Trade (D 3), vol. v. p. 530. (c) 1 P. Wms. 181.

(b) 2 Wms. Saund. 156, n. (1).

years, was held to be good; and in that case the distinction is laid down, that a promise by a trader not to exercise his trade in any part of the kingdom, is bad; but if the promise be confined to any particular place, it is good. [*Patteson J. Horner v. Graves* (a) was relied on when the rule was applied for.] In that case a surgeon dentist agreed with the plaintiff, who was also a dentist, to assist him in his business for five years, for which he was to receive a salary and to be instructed; and it was stipulated that the defendant should not practise within a hundred miles of York, where the plaintiff resided. The Court decided that the agreement was void; but it was on the ground that the distance prescribed by the plaintiff was unreasonable, and that the restraint which the plaintiff had imposed on the defendant was larger than was necessary for his protection. [Lord Denman C. J. The agreement here might be put in force after the plaintiff had left Taunton. *Patteson J.* He might perhaps have a right to require that stipulation, because he might sell his business.] In *Davis v. Mason* (b) the defendant gave a bond to the plaintiff, a surgeon, not to practise on his own account, for fourteen years, within ten miles of the place where the plaintiff resided; and the Court held the bond good. In that case it might have been said that the person to whom the bond was given might have died or ceased to practise before the fourteen years had expired. In *Chesman v. Nainby* (c) and *Hayward v. Young* (d), there was no limitation of the restraint to exercise the trade during the life of either party. *Young v. Timmins* (e) (in which a workman agreed with certain persons, in the situation of factors, to work only for them, except with their consent, and except for persons residing in London or within six miles thereof,) is distinguishable from the present case; for in that case there was no

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(a) 7 Bing. 735.

Cases, 234.

(b) 5 T. R. 118.

(d) 2 Chitty, 407.

(c) 2 Stra. 739; S. C. Lord Raym. 1456; and 1 Bro. Parl.

(e) 1 C. &amp; J. 331.



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provision that the workman should be provided with work to execute. In *Wickens v. Evans* (a) an agreement, which contemplated a partial restraint of trade only, was held to be founded on a sufficient and valid consideration. The observations of *Best C.J.*, in *Homer v. Ashford* (b), upon contracts of this nature, are very applicable to this case.

*Erle* and *Kinglake*, in support of the rule. There was no adequate consideration for this agreement. From any thing that appears to the contrary in the declaration, the defendant may have been in the employment of the plaintiff at the time when the agreement was entered into. To make the agreement valid, it must be shewn either that the defendant received a benefit by the agreement, or that the plaintiff had sustained a loss. The only consideration stated in the declaration is, the mutual promises to perform the agreement. From the earlier cases, which are all mentioned in *Mitchell v. Reynolds* (c), it appears that there must be an adequate consideration. In the case in the Year Book (d) there was no consideration. In the first *Anony-*

(a) 3 Y. & J. 318.

(b) 3 Bing. 322.

(c) 1 P. Wms. 181.

(d) In the case in 2 *Hen.* 5, p. 26, an action of debt on a bond was brought against *John Dyer*. He pleaded that the bond was subject to a condition to make it void, if he, the defendant, did not use his art of dyer craft within the town where the plaintiff lived for a certain time, to wit, for half a year, and averred that he had not used the art of dyer craft within the time limited, and prayed judgment.

HULL.—A ma intent vous purres aver demurre sur luy que l'obligation est voidé, eo q' le condition est encounter common ley et per

dieu, si le pl' fuit icy, il irra al prisō tanq; il ust fait sine au Roy.

This opinion of Mr. Justice *Hull*, so vehemently expressed, was acted upon by the magistrates of Middlesex in the time of Queen *Elizabeth*. In an *Anonymous* case, in the second volume of *Leonard's Reports*, 210, and which is the second case reported in *Moore*, 242, Serjt. *Puckering* obtained a habeas corpus, on behalf of a blacksmith of South Mims, in Middlesex, who had been committed to prison for taking a bond from a blacksmith, of the same town, that he should not exercise his trade within the same or a certain precinct of it. The Court of Common Pleas determined, that although they, be-

*mous* case in *Moore* (a), a mercer took a bond from his apprentice not to exercise his trade in Nottingham; and it was held void. In another case, which is also in *Moore* (b), a bond, taken from a blacksmith, not to exercise his trade in South Mims, in Surrey, was held void. In *Chesman v. Nainby* (c) the Court took into contemplation the consideration of the agreement, and the bond is very particular in reciting the advantages which the obligor would derive by being taken into the service of the obligee.

The agreement is void, as being in restraint of trade. It is laid down in *Horner v. Graves* (d), that a contract which contains a restraint on the one party larger than is necessary for the protection of the other, is void; and it was said that the contract in that case was unreasonable, because it was to hold good during the whole time the plaintiff continued to carry on his business, wherever he might be; so that if the plaintiff removed from York to places where the practice at York by the defendant could not injure him, still the restriction was to continue. The restriction in this case is greater than is necessary for the protection of the plaintiff, because the time is unlimited. The restraint is not confined to any contingency of the plaintiff's selling his business, or of his dying, or of his executor wishing to sell his business. Although the plaintiff may wholly relinquish business without selling it to any one, or may die, and no one carry on the business, still the defendant is to be prevented from exercising his trade in Taunton and the vicinity. In *Mitchell v. Reynolds* (e) and *Homer v. Ashford* (f), the restraint was limited in point of time. There is no case in which it has been held, that by an agreement

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ing a high Court, might punish such offences appearing before them on record; yet it did not follow that justices of the peace might so do.

(a) P. 115.

(b) P. 242; S. C. more fully re-

ported in 2 Leonard, 210.

(c) 2 Stra. 739; S. C. Ld. Raym. 1456; and 1 Bro. Parl. Cases, 234.

(d) 7 Bingh. 735.

(e) 1 P. Wms. 181.

(f) 3 Bingh. 322.

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between two parties, the one party may be restrained from exercising his trade during his life. In *Gale v. Reed* (a) it is said by Lord *Ellenborough*, that the restraint on one side meant to be enforced should in reason be coextensive only with the benefits meant to be enjoyed on the other.

*Cur. adv. vult.*

LORD DENMAN C. J., in the course of Trinity term, 1836, delivered the judgment of the Court as follows:—

This was a motion in arrest of judgment. The action was in assumpsit, on an agreement made by the defendant not to carry on the business of a druggist in the town of Taunton. Some minor objections were taken to the declaration, which it is unnecessary to notice, as we are of opinion that the agreement itself is illegal.

The law upon this subject has been settled by a series of decisions, from *Mitchell v. Reynolds* (b) to *Horner v. Graves* (c),—viz. that an agreement for a partial and reasonable restraint of trade, upon an adequate consideration, is binding; but that an agreement for general restraint is illegal. What shall be considered as a reasonable restraint was much discussed in the case of *Horner v. Graves* (c), where the Chief Justice of Common Pleas observed, “We do not see how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either: it can only be oppressive; and if oppressive, it is in the eye of the law unreasonable. Whatever is injurious to the interests of the public, is void on the grounds of public policy.” It may indeed be said that all such agreements interfere in some

(a) 8 East, 80—86.

(b) 1 P. Wms. 181.

(c) 7 Bingh. 735.

degree with the public interest, and great difficulty may attend the application of that test, from the variety of opinions that may exist on the quantum of interference with the public interest which the law ought to permit. But on the other hand it appears quite safe to hold that the law will not enforce any agreement for curtailing the rights both of the public and the contracting party, without its being necessary for the protection of him in whose favour it is made. In that case the question arose upon the distance to which the restraint extended; here it arises upon the time. The agreement, as to time, is indefinite: it is not limited to such time as the plaintiff should carry on business in Taunton, nor to any given number of years, nor even to the life of the plaintiff; but it attaches to the defendant so long as he lives, although the plaintiff may have left Taunton, or parted with his business, or be dead. None of the cases in the books turn upon this question. It is indeed alluded to in *Chesman v. Nainby (a)*, and the counsel for the plaintiff, *arguendo*, seemed to admit that the bond on which that action was brought could not be put in force for a breach after the death of the obligee; but the breach was assigned on another part of the condition, and held good. In the present case the agreement, not being under seal and not being divisible, if bad in part, is bad altogether. In the absence of any authority establishing the validity of an agreement thus indefinite in point of time, and trying the reasonableness of it by the test above alluded to, we think that the restraint is larger than the necessary protection of the party in favour of whom it is given requires; and that it is therefore oppressive and unreasonable. The consideration for this agreement appears to have been trifling; but even if it had been much more valuable, the same result would have followed. The judgment must be arrested.

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Judgment arrested.

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The plaintiff subsequently brought a writ of error in the Exchequer Chamber.

The points for argument stated by the plaintiff were as follows. The declaration is sufficient in point of law, and shews a sufficient cause of action by the plaintiff against the defendant. The plaintiff will contend that the agreement between the parties is only in partial restraint of trade; and therefore it was not void on that ground: the defendant might have carried on his trade beyond the prohibited distance; and that it is not against public policy, so as to render it void. The plaintiff also will contend, that if such an agreement could not be put in force against the defendant after the plaintiff's death, yet that the agreement is devisable, and at all events is good during the defendant's life; and that as the breach is alleged during the plaintiff's life, it is good in point of law. It is not alleged in the pleadings that the public would be injured by the partial restraint mentioned in the agreement. The plaintiff will further contend, that the agreement is not unreasonable or oppressive against the defendant; but that the consideration being one through which the defendant would obtain present means of livelihood, and as he entered into the employment upon the condition that the agreement should be executed, such agreement is binding upon him in point of law.

The statement by the defendant was as follows. That the contract set forth in the declaration is void, as being in restraint of trade. That the consideration for that contract is insufficient, and that it is wholly inadequate, when compared with the restraint imposed. That the restraint is uncontrollable as to time, and that the contract is entire and indivisible, and more restrictive than necessary for the plaintiff's protection; and that, being unreasonable and oppressive, it is void in point of law.

The case was argued on the 26th day of November, 1836, before *Tindal C. J.*, Lord *Abinger C. B.*, *Alderson B.*, *Bolland B.*, *Gaselee J.*, and *Vaughan J.*

Sir *W. W. Follett* (with whom was *Crowder*), for the plaintiff in error. The judgment given by the Court of King's Bench, for arresting the judgment, is erroneous. It was voluntary on the part of *Hitchcock* to take *Coker* into his service, and he was entitled to make such conditions as he thought requisite to prevent his business being injured by *Coker*, from the information he might derive by being taken into the business. The question is, whether the condition which prevents *Coker* from exercising, at any time during his life, the trade of a chemist in the town of Taunton, is an illegal condition in point of its duration, and whether there is a sufficient consideration for it. There was evidently ample consideration; and therefore the simple question is, whether the agreement by *Coker* not to carry on business there during his life, is legal. It is contended that it is legal. The Court of King's Bench, in their judgment, say that the restraint is, in point of time, greater than is necessary for the protection of *Hitchcock*, not being confined to the time that he carries on business, nor to his life. It has undoubtedly been held in several cases, that the restraint was too great where it extended over a vast extent of country; but it has never been held that the restraint ought to be limited to the life of the party imposing the restraint. In *Horner v. Graves* (a) the party was restrained by the agreement from practising within a hundred miles round York; and that was held to be void. In *Bunn v. Guy* (b), an agreement by an attorney not to practise within London or 150 miles from thence, was held to be good. *Hitchcock* may require the full protection of a restraint of this kind on his entering into partnership, or on his selling his business. *Hitchcock* has a right to sell the goodwill of his business, which, without the agreement in question, he could not so well do. According to the judgment of the Court of King's Bench, the restraint should be confined to the life of *Hitchcock*, but surely he has a right to leave to

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(a) 7 Bing. 735.

(b) 4 East, 190.

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his children his business in the same way in which he carried it on himself. Why should *Hitchcock* be prevented from hindering his assistant setting up as a rival to his children as well as to himself? Suppose *Hitchcock* took in a partner, and afterwards died,—is this agreement bad, because it will still prevent *Coker* from setting up business in opposition to the partner? There is no doubt that the goodwill of a business is assets in the hands of an executor. In point of authority, as well as in reason, there is nothing to shew that the condition ought to have been confined to the life of *Hitchcock*. The leading case is *Mitchell v. Reynolds* (a). In that case it was said by *Parker C. J.*, in delivering the judgment of the Court, “that the true distinction of this case is not between promises and bonds, but between contracts with and without consideration, and that wherever a sufficient consideration appears to make it a proper and an useful contract, and such as cannot be set aside without injury to a fair contractor, it ought to be maintained. In the same judgment, after citing a case in *Noy’s Reports* (b), it is said, “In that case all the reasons are clearly stated; and indeed all the books, when carefully examined, seem to concur in the distinction of restraints general and restraints particular, and with or without consideration. It stands upon very good consideration, volenti non fit injuriâ; a man may, upon a valuable consideration, by his own consent and for his own profit, give over his trade and part with it to another in a particular place.” Undoubtedly he may part with his trade for his life, if he pleases. In *Chesman v. Nainby* (c), the one party who was taken into the service of the other, agreed that she would not at any time, after she had left the service of the other party, exercise the trade of a linen draper within half a mile of the residence, for the time being, of her mistress, or in

(a) 1 P. Wms. 181. See *Clerk v. The Taylors of Exeter*, 3 Lev. 241.

(c) 2 Stra. 739; S. C. 2 Ld. Raym. 1456, and 1 Bro. Parl. Cases, 234.

(b) *Jelliet v. Broad, Noy*, 98.

any other house her mistress, her executors or administrators should think proper to move to. In *Davis v. Mason* (a) the bond contained an agreement, that in consideration *A.* would take *B.* as an assistant in his business of a surgeon for so long a time as it should please *A.*, *B.* agreed not to practise, on his own account, for fourteen years, within ten miles of the place where *A.* lived. That agreement was held good. That is an authority against the judgment of the Court of King's Bench in this case, as there was no stipulation that *B.* should practise in case *A.* died within the fourteen years. In *Bunn v. Guy* (b) there was no stipulation respecting the death of the attorney, who relinquished business. *Hayward v. Young* (c) has been disapproved of by the Court of Chancery. In *Homer v. Ashford* (d) there was an agreement between two manufacturers as to selling their goods, in particular towns, at certain times. There was no limitation in that case with respect to the death of either party, and the Court upheld the agreement. The judgment of the Court of King's Bench proceeded upon the opinion of the Court of Common Pleas, delivered by *Tindal C. J.*, in *Horner v. Graves* (e). The Court of King's Bench have made an erroneous application of the principles of that case. In the judgment in that case it is said, "But the greater question is, whether this is a reasonable restraint of trade; and we do not see how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either: it can only be oppressive; and if oppressive, it is in the eye of the law unreasonable." That refers to the case of

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(a) 5 T. R. 118.

(b) 4 East, 190.

(c) 3 Chit. 407.

(d) 3 Bingham. 322.

(e) 7 Bingham. 735.



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a party, having no interest in a trade, taking a bond from another not to exercise his trade in a particular place. The restraint in this case is not larger than is necessary for the protection of *Hitchcock*; for how could his executors carry on the business unless it were protected by this restriction? Applying therefore the test mentioned by *Tindal C. J.*, this restriction is legal. In *Bryson v. Whitehead* (a) the Vice-Chancellor appears to have been of opinion, that in a covenant in restraint of trade no limit as to time, but only as to locality, was necessary. The same doctrine was recognized by Lord *Eldon*, in *Williams v. Williams* (b) and in *Capes v. Hutton* (c).

*Erle* (and *M. Smith* was with him), *contra*. The contract is void. The general rule of law is, that all contracts in restraint of trade are void. There is an exception of contracts in partial restraint of trade, if they have been made upon a good and adequate consideration. That principle was laid down by *Parker C. J.*, in *Mitchell v. Reynolds* (d). The question therefore for the consideration of the Court is, whether the restraint imposed in this case is greater than was necessary for the protection of the plaintiff; and whether the agreement was made not only for a good, but also for an adequate consideration. By the agreement, the defendant is restrained from practising in Taunton during the whole of his life: that is a restraint greater than is necessary for the protection of the plaintiff; nor is there an adequate consideration for the agreement. The agreement is almost *nudum pactum*. Certainly there is no adequate consideration. Nothing is stipulated by the agreement to be performed by the plaintiff; and it appears from it, that previously to the execution of the agreement, the defendant was in the plaintiff's service. [*Alderson B.* How is the Court to decide on this record

(a) 1 S. & Stew. 74.

(b) 2 Swanst. 263.

(c) 2 Russ. 357. See *Morris v.*

*Colman*, 18 Ves. jun. 487; *Shackle v. Baker*, 14 Ves. 468.

(d) 1 P. Wms. 181.

whether the consideration was adequate?] There are many cases in which the Courts have considered the adequacy of the consideration. Assuming that there was some consideration, it is incumbent on the plaintiff to shew that the restriction was not wider than was necessary for his protection. *Mitchell v. Reynolds* (a) is the leading case on this subject. In that case the rule for which the defendant now contends was laid down; and the Court there decided that they would allow of some prejudice to the public, provided the restraint were made for a good and adequate consideration; and it may be collected, from the judgment of Lord *Kenyon* in *Davis v. Mason* (b), that the consideration must appear on the face of the agreement. In the earlier cases the question arose upon bonds, which are presumed to be given for good consideration. There are two *Anonymous* cases in *Moore's Reports* (c). [*Alderson* B. In those cases the agreement was to refrain wholly from exercising a trade, without any consideration; and the bonds were held void, because they were given to enforce an agreement which was illegal.] In *Broad v. Jollyfe* (d) the defendant received a good and adequate consideration for his promise to relinquish his trade; and on that ground the agreement was upheld. In *Prugnall v. Goss* (e) it was laid down, that where a bond or promise restrains the exercise of a trade, although it be as to a particular place only, yet if it be upon no consideration, the bond or promise is void. It is evident therefore that the Court in that case looked to the consideration for the agreement. In *Young v. Timmins* (f) the Court looked to the adequacy of the consideration: Lord *Lyndhurst* C. B. thus expresses himself:—"Where one party agrees with another to employ him, and the latter agrees

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(a) 1 P. Wms. 181.

(b) 5 T. R. 118.

(c) P. 115 and p. 242; S. C.  
more fully reported in 2 Leonard,  
210.

(d) Cro. Jac. 596; S. C. Noy,  
98, and W. Jones, 13.

(e) Aley's Rep. 67.

(f) 1 C. &amp; J. 381.

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not to work for any third person, such agreement is a partial restraint of trade, and must be supported by *an adequate consideration*. The question then in the present case is, whether there is *an adequate consideration* for the stipulations in this agreement on the part of the bankrupt." [Tindal C. J. There was no consideration for the agreement in that case. Alderson B. The consideration in that case was, that the one party should employ the other as *theretofore*, which was if they liked.] In this case the plaintiff might determine the employment of the defendant at any time. There was no undertaking by Hitchcock to employ Coker for any specific period of time. [Lord Abinger C. B. An annual salary was to be paid, and therefore at any rate it was an engagement for a year.] There is nothing on the face of the agreement to shew that the plaintiff might not have determined the agreement immediately after the agreement was signed. Indeed, for any thing that appears on the declaration at the time the agreement was signed, the defendant might have left the service of the plaintiff. The case therefore is much stronger than *Young v. Timmins* (a), in which the Court held the agreement void, because there was not an adequate consideration. In *Gale v. Reed* (b) the adequacy of the consideration was considered by the Court. Lord Ellenborough in that case says, "It remains to be considered whether the covenant in question be void upon the ground already mentioned, namely, as being a particular restraint of trade without *adequate consideration*." *Chesman v. Nainby* (c) also proceeded on the ground that the agreement was for a partial restraint of trade, upon a reasonable consideration. *Horner v. Graves* (d) was in accordance with the previous cases; and that case established the proposition already stated, that all agreements in restraint of trade are void, with one exception, namely, where the agreement is made

(a) 1 C. &amp; J. 331.

Raym. 1456; and 1 Bro. Parl. Cases, 234.

(b) 8 East, 80.

(c) 2 Stra. 739; S. C. 2 Ld.

(d) 7 Bingh. 735.

for a partial restraint of trade, upon an adequate consideration, and the restraint is not greater than is necessary for the protection of the party imposing it. In the judgment in *Horner v. Graves* (a), *Tindal C. J.*, after stating the circumstances of the case, observes, "Surely this appears a very slender and *inadequate* consideration for such a sacrifice;" and it is added, that whatever restraint is larger than the necessary protection of the party requires, is illegal. Here the restraint was greater than was required.

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Sir *W. W. Follett* in reply. There is no dispute as to the principle of law, and the only question now is, whether or not a contract in partial restraint of trade must be made on an adequate consideration. There is no case in which the Courts have decided on the *adequacy of consideration*, in the sense in which that expression is now used. There are, undoubtedly, cases in which the Courts have decided whether there was any consideration. In *Young v. Timmins* (b), the words, "adequate consideration," are certainly used by Lord *Lyndhurst* and Mr. Baron *Bayley*, but they have borrowed the term from *Parker C. B.*, in *Mitchell v. Reynolds* (c), and in that case it is used as meaning good consideration. The words "adequate, good, sufficient, and reasonable," are used as convertible terms. It is impossible for the Court to inquire into the adequacy of the consideration, in the sense of the term now contended for. It is clear from the declaration, that the agreement was part of the original contract. The declaration states, that the plaintiff had taken the defendant into his service upon condition that he should enter into and observe the agreement. [Lord *Abinger, C. B.* Suppose the plaintiff gave up business, and afterwards died, and the defendant commenced business in Taunton, could the executor of the plaintiff maintain an action on this agreement?] It is apprehended he could

(a) 7 Bingh. 735.

(c) 1 P. Wms. 181.

(b) 1 C. & J. 331.

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not, because neither he nor his testator would sustain any damage. But the question is, whether this agreement is oppressive, and therefore illegal. It is not oppressive, because there is good consideration for it. In *Ridgway v. The Hungerford Market Company* (a), it was held that an agreement like this could not be put an end to on a month's notice. In *Davis v. Mason* (b) the consideration of the agreement was, that A. should take B. as an assistant in his business of a surgeon, for so long a time as it should please A. That was held to be a good consideration. In *Bunn v. Guy* (c) Lord Ellenborough C. J. said "the consideration of loss or inconvenience sustained by one party at the request of another, is as good a consideration in law for a promise by such other, as a consideration of profit or convenience to himself." That rule is applicable to contracts of this description. Here, the taking the defendant into his service was a sufficient consideration. In the two cases in *Moore's Reports* (d), and in *Prugnell v. Goss* (e), there was no consideration. In *Young v. Timmins* (f), there was no consideration, as there was nothing binding on the employers in that case. In *Wickens v. Evans* (g), *Hullock B.* says "the question is properly stated when it is said to be whether there be a *sufficient consideration*. I do not understand the principle on which it is argued that there is here no consideration, because it is not extrinsic or foreign to the instrument. The law makes no distinction of that kind, but looks whether there is upon the face of the instrument a *good and valid consideration*, that is to say, either a benefit to one party, or a loss to the other." *Chesman v Nainby* (h) is very like this case, and it was there held, that the one party taking the other into his service is a good consideration. The argument on the

(a) 4 N. & M. 797; S. C. 3 A. & E. 171.

(b) 5 T. R. 118.

(c) 4 East, 190.

(d) P. 115, 242; S. C. more fully reported in 2 Leonard, 210.

(e) Aley's Rep. 67.

(f) 1 C. & J. 131.

(g) 8 Y. & J. 318.

(h) 2 Stra. 739; S. C. 2 Ld.

Raym. 1456; and 1 Bro. Parl. Cases, 234.

other side has rested on the exact expressions used in the cases, and not on the principles laid down in them. It cannot be generally contended, that an agreement in partial restraint of trade is bad, unless the consideration appears on the face of it. Here, however, the consideration does so appear on the face of the agreement.

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*Cur. adv. vult.*

TINDAL C. J., in Hilary Vacation (Feb. 6), delivered the judgment of the Court as follows :—The ground upon which the Court of King's Bench held, after a verdict obtained by the plaintiff in this case, that the judgment of that Court ought to be arrested was, that the agreement set out upon the record upon which the action was brought was void in law, being an agreement in unreasonable restraint of trade.

For, although the inadequacy of the consideration upon which the agreement was entered into was urged in argument as one reason for holding the agreement to be void, and in the delivering the opinion of the Court some reference was made to that objection, yet it is manifest that it formed no part of the ground upon which the Court refused to give their judgment in favour of the plaintiff. The consideration for the agreement in question appears to have been the receiving of the defendant into the service of the plaintiff, as an assistant in his trade or business of a chemist and druggist, at a certain annual salary. And the agreement on the part of the defendant founded upon such consideration is, that if he should at any time thereafter, directly or indirectly, in his own name or that of any other person, exercise the trade or business of a chemist and druggist within the town of Taunton, in the county of Somerset, or within three miles thereof, then that the defendant should, on demand, pay to the plaintiff, his executors, administrators or assigns, the full sum of 500*l.* as and for liquidated damages.

The ground upon which the Court below has held this

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restraint of the defendant to be unreasonable is, that it operates more largely than the benefit or protection of the plaintiff can possibly require ; that it is indefinite in point of time, being neither limited to the plaintiff's continuing to carry on his business at Taunton, nor even to the term of his life. We agree in the general principle adopted by that Court, that where the restraint of a party from carrying on a trade is larger and wider than the protection of the party with whom the contract is made can possibly require, such restraint must be considered as unreasonable in law, and the contract which would enforce it must be therefore void. But the difficulty we feel is, in the application of that principle to the case before us. Where the question turns upon the reasonableness or unreasonableness of the restriction of the party, from carrying on trade or business within a certain space or district, the answer may depend upon various circumstances that may be brought to bear upon it ; such as the nature of the trade or profession, the populousness of the neighbourhood, the mode in which the trade or profession is usually carried on, with the knowledge of which, and other circumstances, a judgment may be formed whether the restriction is wider than the protection of the party can reasonably require. But with respect to *the duration* of the restriction, the case is different. The goodwill of a trade is a subject of value and price. It may be sold, bequeathed, or become assets in the hands of the personal representative of a trader. And if the restriction as to time is to be held to be illegal, if extended beyond the period of the party by himself carrying on the trade, the value of such goodwill, considered in those various points of view, is altogether destroyed. If, therefore, it is not unreasonable, as undoubtedly it is not, to prevent a servant from entering into the same trade in the same town in which his master lives, so long as the master carries on the trade there, we cannot think it unreasonable that the restraint should be carried further, and should be allowed to continue if the master sells the trade, or bequeaths it, or it

becomes the property of his personal representative, that is, if it is reasonable that the master should, by an agreement, secure himself from a diminution of the annual profits of his trade, it does not appear to us unreasonable that the restriction should go so far as to secure to the master the enjoyment of the price or value for which the trade would sell, or secure the enjoyment of the same trade to his purchaser, or legatee, or executor. And the only effectual mode of doing this appears to be by making the restriction of the servant's setting up or entering into the trade or business within the given limit, co-extensive with the servant's life. And accordingly, in many of the cases which have been cited, the restriction has been held good, although it continued for the life of the party restrained. And on the other hand, no case has been referred to where the contrary doctrine has been laid down. In *Bunn v. Guy* (a), a covenant by an attorney who had sold his business to two others, that he would not, after a certain day, practise within certain limits, as an attorney, was held good in law, though the restriction was indefinite as to time. In *Chesman v. Nainby* (b) (in error) the condition of the bond was, that *Elizabeth Vickers* should not, after she left the service of the obligee, set up business in any shop within half-a-mile of a dwelling-house of the obligee, or of any other house that she, her executors or administrators, should think proper to remove to in order to carry on the trade, and in that case the contract was held to be valid, though the restriction was obviously indefinite in point of time; and although one of the grounds on which the validity of the contract was sought to be impeached was, that the restriction was for the life of the obligor. Again, in *Wickers v. Evans* (c), the agreement in restraint of trade was made to continue during the lives of the contracting parties, and no objection was taken on that ground.

We cannot, therefore, hold the agreement in this case to

(a) 4 East, 190.

(c) 3 Y. & J. 318.

(b) 1 Bro. P. C. 234.

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be void, merely on the ground of the restriction being indefinite as to duration, the same being in other respects a reasonable restriction.

But it was urged in the course of the argument, that there is an inadequacy of consideration in this case with respect to the defendant, and that upon that ground the judgment must be arrested. Undoubtedly, in most, if not all the decided cases, the judges, in delivering their opinion that the agreement in the particular instance before them was a valid agreement, and the restriction reasonable, have used the expression, that such agreement appeared to have been made on an adequate consideration, and seem to have thought that an adequacy of consideration was essential to support a contract in restraint of trade. If, by the expression, it is intended only that there must be a good and valuable consideration, such consideration as is essential to support any contract not under seal, we concur in that opinion. If there is no consideration, or a consideration of no real value, the contract in restraint of trade, which in itself is never favoured in law, must either be a fraud upon the rights of the party restrained, or a mere voluntary contract, a nudum pactum, and therefore void. But if by adequacy of consideration more is intended, and that the Court must weigh whether the consideration is equal in value to that which the party gives up or loses by the restraint under which he has placed himself, we feel ourselves bound to differ from that doctrine. A duty would thereby be imposed upon the Court in every particular case, which it has no means whatever to execute. It is impossible for the Court, looking at the record, to say whether, in any particular case, the party restrained has made an improvident bargain or not. The receiving instruction in a particular trade might be of much greater value to a man in one condition of life than in another, and the same may be observed as to other considerations.

It is enough, as it appears to us, that there actually is a consideration for the bargain, and that such consideration

is a legal consideration, and of some value. Such appears to be the case in the present instance, where the defendant is retained and employed at an annual salary. We therefore think, notwithstanding the objections which have been urged on the part of the defendant, that the plaintiff has shewn upon the record a legal ground of action, and having obtained a verdict in his favour, that he is entitled to judgment.

Judgment for the plaintiff.

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The Emperor of BRAZIL v. ROBINSON.

*W. H. WATSON* had obtained a rule nisi, calling on the plaintiff to give security for costs. The action was on a charter-party, brought in the name of the Emperor of Brazil, in South America.

Monday,  
May 8th.  
A foreign sovereign residing abroad, who is plaintiff in an action, must give security for costs.

*Martin* now shewed cause against the rule. In *The Duke de Montellano v. Christin (a)*, the Court refused to compel a foreign ambassador to give security for costs; and Lord *Ellenborough* said, "considering an ambassador is the immediate representative of the crowned head whose servant he is, it would hardly be respectful, in the first instance, to exact such a security, unless there were pregnant reasons for believing it to be necessary." If the Court forbore from requiring an ambassador to give security for costs, surely it will not compel a foreign sovereign.

*W. H. Watson*, in support of the rule. The ambassador in that case was resident in this country.

Lord DENMAN C. J.—The plaintiff is residing abroad, and cannot be distinguished from any other suitor.

The rest of the judges concurred.

Rule absolute.

(a) 5 M. & S. 503.

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## SPENCER v. NEWTON. (a)

1. A party to a reference, who, after the adjournment of the hearing of the reference to a subsequent day, does not, within a reasonable time, return home for want of pecuniary means, is not, during the period of adjournment, privileged from arrest.

2. A party who lived in the country came up to attend a meeting before an arbitrator on the 6th of January. The meeting took place on the 7th, and the opposite party gave notice that they would not proceed with the reference, but apply to the Court in Hilary term to set it aside. The arbitrator adjourned the hearing of the reference until the 15th of February. The party remained in London until the 16th of January, not having pecuniary means to return, and waiting to see if any motion would be made. No motion was made, and as he was proceeding to take his place on the 16th to return home, he was arrested. It was held, that he had stayed an unreasonable time, and was not privileged from arrest.

IN this case a rule nisi had been obtained to discharge the defendant out of custody, on the ground that he had been arrested while attending an arbitration, and whilst therefore privileged from arrest.

It appeared from the affidavits, that the defendant in this action had been a plaintiff in two others, which had been referred to the arbitration of a barrister. The arbitrator appointed the 6th of January for the attendance of the parties before him. The parties attended on the 7th of January, Mr. *Newton* coming up for the purpose from his residence in Yorkshire. At the meeting the attorneys for the defendants, in the two actions in which Mr. *Newton* was the plaintiff, gave notice to the arbitrator that the defendants declined to proceed with the reference. The attorney for the defendants asserted, that the order for the reference had been surreptitiously obtained, and that he intended to apply to the Court of Exchequer, where the actions were brought, to set it aside. The arbitrator then took the evidence of the witnesses, and adjourned the reference to the 15th of February, to enable the defendants, if they thought proper, to move in the course of Hilary term to set the order of reference aside. Mr. *Newton* resolved to wait in town for a few days to see the result of the application, and to meet and answer it. He was staying at an inn in the city, and on his return there he was taken ill. Until the 16th of January he was without the pecuniary means of paying his bill at the inn, or of paying his fare to Yorkshire. On the 16th he received some money. On the 16th he was arrested on his way from Lincoln's Inn Hall to the coach-office in the city, on mesne process, at the suit of the plaintiff, *Spencer*. A detainer was also lodged against him on a ca. sa. at the suit of Mr. *Lane*, an

(a) This case was decided in Hilary term.

attorney. Mr. *Newton* was a student of Lincoln's Inn, and during his stay in London had kept Hilary term. When he was arrested he was going to the inn to take his place by the coach.

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Sir *F. Pollock*, on behalf of *Spencer*, and *Kelly* on behalf of *Lane* (on the 27th January), shewed cause against the rule. Undoubtedly a party attending an arbitrator is privileged from arrest *eundo*, *morando*, et *redeundo*, on a deviation for a necessary purpose; *Spence v. Stuart* (a), *Ricketts v. Gurney* (b). But it cannot with any reason be contended, that the applicant in this case was privileged from the 16th of January to the 15th of February. The law is not very strict in requiring a party to return home immediately after a cause has been tried; but upon an examination of the cases it will be found, that a couple of days is the utmost period of time a party has been allowed to delay. In *Lightfoot v. Cameron* (c) the party arrested had attended his cause all day in Court, and retired in the evening to dine with his attorney and witnesses at a tavern. In *Hatch v. Blisset* (d), the trial at Winchester was over on Friday at four in the afternoon, and the defendant stayed there till after dinner on Saturday, and in the evening at seven was arrested going home to Portsmouth, which was twenty miles off. The Court in that case said, a *little* deviation or loitering would not deprive the party of the privilege. In *Randall v. Gurney* (e), a party in London was required to attend an arbitrator at Exeter on a given day, and, three days before he set off, he went, accompanied by his attorney, to Clifton, where his wife resided, and where there were certain papers necessary to be produced before the arbitrator. He was occupied for a great part of two days in selecting and arranging the papers, and in the afternoon of the second day was arrested. It was held, that he

(a) 3 East, 89.

(d) *Gilbert's cases*, K. B. 308.

(b) 7 Price, 699.

(e) 3 B. & Ald. 252.

(c) 2 W. Black. 1113.

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was not privileged from arrest under those circumstances, having employed more than a reasonable time for the above purpose, and it not being sworn that he was occupied, during all the time he was at Clifton, in the object for which he went thither.

The defendant alleges that he was unwell and without funds. [*Coleridge J.* Does the affidavit fix the time when the defendant's illness commenced, and when it ceased?] It does not. The poverty of the defendant can be no reason why he should be discharged, otherwise a pauper who lived in the country, and had a cause to be tried in London, would for ever be privileged from arrest. The defendant ought to have provided himself with sufficient funds, before he left his residence, to enable him to return. Besides, it appears that the defendant kept his term, and the probability is, that he stayed in London as much for that purpose as to see the result of any application to the Court with respect to the order of reference.

*Sir J. Campbell, A. G.* in support of the rule. The defendant was privileged from arrest. It is not contended that the defendant was privileged, by reason of the adjournment of the reference, until the 15th of February, but he had a right to stay to meet the threatened motion. It was an imputation on his character, and he was bound to stay and meet it. The notice of the intended application was given on the 7th, the 8th was Sunday, and Hilary term commenced on the 11th. The defendant's stay, therefore, before the term, consisted only of two clear days. The motion might be made on any one of the first four days of term. Until Saturday, the defendant could not know whether such a motion was made. The 15th was Sunday, on which day he was not bound to travel. The law does not protect parties and witnesses in a suit upon any measurement of hours and days, but they are privileged until they can conveniently, and using reasonable diligence, return to their

residence; *Stokes v. White* (a). If a party be detained by inevitable accident, by storms, by floods, or by want of conveyance, the privilege from arrest continues. The defendant here was prevented by illness, and from want of funds, from returning until the 16th of January. It is not contended that the defendant was privileged until the 15th of February, but only until he had ascertained whether a motion would be made. In *Childerston v. Barrett* (b), the plaintiff, who resided in the country, had come up to town to attend the trial of his cause against the defendant, at the sittings at Guildhall, and had been in attendance for several days, and whilst waiting at Guildhall Coffee House for that purpose was arrested. It was held, that under those circumstances the plaintiff was privileged from arrest, although the cause was not put down in the cause paper for trial that day. In *Ricketts v. Gurney* (c) the Court of Exchequer discharged a party from custody on the same facts that were shewn in *Randall v. Gurney* (d). In the latter case, the Court of King's Bench thought that the defendant had stayed for an unreasonable length of time at Clifton, and that his journey to Clifton was merely for the purpose of avoiding his creditors in London. There is no doubt in this case that the defendant was prevented from illness, and from want of money, from returning to his residence.

PATTESON J. (e)—I quite agree in the observation, that this Court, when considering whether the party is privileged from arrest, does not measure the privilege by hours or by days, but looks to see whether the party has returned within a reasonable time. If the Court be satisfied on that point, whether the person be a party or a witness in the suit, he is protected from arrest. The question in this case is, whether the defendant was justified in waiting to see if any motion would be made in the Exchequer, for undoubtedly

(a) 1 C. M. &amp; R. 223.

(d) 3 B. &amp; Ald. 252.

(b) 11 East, 439.

(e) Lord Denman C. J. had left the Court.

(c) 7 Price, 699.

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he would not have been justified in remaining in London solely on the ground that the arbitration had been adjourned. It is said that it was impossible for him to return. I believe it was, but that impossibility arose from the want of pecuniary means. Such an excuse this Court cannot receive. On the meeting before the arbitrator it was stated, that the defendant had obtained a judge's order surreptitiously, and the arbitrator adjourned the meeting to enable the defendants in the suits referred to, to move the Court to set it aside. This meeting was on the 6th of January, and Hilary term began on the 11th, and it is urged that this gentleman was entitled to wait until the motion was made. It is to be observed, that it was not necessary that the motion should be made within the first four days of term. It was only necessary that it should be made within a reasonable time. The defendant waited until the 16th, and finding that no motion would be made, he took his place by the coach. The question therefore is this, whether the notice of the intended application entitled him to stay in town so long. There is no case cited like the present. *Ricketts v. Gurney* (a) merely decides, that the party, by going to Clifton, did not unnecessarily deviate from his place of residence to the place of meeting. In the other cases cited, the parties only stayed a short time before setting out on their return home. The case most like the present is *Childerston v. Barrett* (b). In that case, the party was waiting for the hearing of his cause, although it was not in the paper. In *Gibbs v. Phillipson* (c), which was a case in Chancery, a witness went three days before the day appointed by the examiner for the examination, to the solicitor's office, to look at the interrogatories, with a view to prepare him to give his evidence accurately. It was held, that he was not protected from arrest. There is another case in Chancery, where there was an adjournment to a later hour in the same day. Here no motion was actually

(a) 7 Price, 699.

also *Sidgier v. Birch*, 9 Ves. 69;


(b) 11 East, 439.

*Franklyn v. Colquhoun*, 1 Mad.

(c) 1 Russ. &amp; Mylne, 19. See

580.

made in Court, and it is a question, whether the defendant was justified in staying eight days to see whether one would be made. If we were to hold that he was, we should carry the time far beyond any former case.

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WILLIAMS J.—I shall only add one word as to the suggestion that the defendant was waiting in London in order to see whether a motion would be made to set aside the order of reference. Every body is aware that before that application is made an affidavit is prepared, and that there would be no necessity on the part of the defendant to shew cause instanter. I am at a loss to discover what benefit the defendant could derive by waiting for the application to the Court. That is the only point in the case; for the illness is not made out by the affidavits. It appears he was well enough to attend at Lincoln's Inn Hall.

COLERIDGE J.—I am quite of the same opinion. I was only anxious to see whether or not the defendant had really been prevented by illness from returning home. If he had been detained by illness, that would have been a sufficient excuse. I cannot, however, discover that illness alone prevented his return, and the want of pecuniary means is no excuse.

Rule discharged.

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SPENCER v NEWTON.

Friday,  
 April 28th.

THE defendant had been arrested on a *capias*, at the suit of the plaintiff, on the following affidavit: "*John Har-* 1. An affidavit of debt made by the manager of a joint stock bank in the following form:—"*J. H.* manager of the Ripon branch of the Yorkshire bank, maketh oath and saith, that *A. N.* is justly and truly indebted unto *J. S.*, as one of the registered public officers of the Yorkshire bank, in 50*l.* for money lent by this deponent, as such manager as aforesaid, is irregular," in not shewing that the manager was authorized to lend the money, but it is not altogether bad.

2. Arrest was made in London fourteen days before the end of Hilary term, on an irregular affidavit to hold to bail. The prisoner made no application to be discharged out of custody on this ground, till three days after term: Held, that the application was too late, there being reason to suppose that the irregularity had come to the notice of the prisoner during the course of the term.

3. Appearing as an attorney before a judge for a prisoner in custody on a *capias* ad respondendum, does not constitute him attorney in the suit, so as to entitle the plaintiff to leave the declaration at his office.



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vey, of Ripon, in the county of York, manager of the Ripon branch of the Yorkshire District Bank, maketh oath and saith, that *A. Newton* is justly and truly indebted unto *J. Spencer* of Plantation, in the county of the city of York, esquire, as one of the registered public officers of the said Yorkshire District Bank, in the sum of 50*l.*, for money lent by this deponent, as such manager as aforesaid, to the said *A. Newton*, at his request." The defendant applied to this Court to be discharged out of custody on this arrest, on the ground of privilege, but the rule *nisi* which he had obtained on this application was discharged in Hilary term last (a). No objection was taken in the course of that term to the sufficiency of the affidavit to hold to bail, but on the 3d of February the defendant took out a summons before *Patteson J.*, to be discharged out of custody on that ground. His lordship, however, thought the affidavit sufficient, and refused to make any order, and *Littledale J.*, on a subsequent application to him, refused to interfere.

A copy of a declaration in this suit was left, on the 16th February, at the office of an attorney who had attended for the defendant on different summonses before learned judges, subsequent to the arrest, and a rule to plead was obtained. The defendant contended that the service was irregular, as the attorney was not his attorney in the cause; but *Coleridge J.* refused to set aside the rule to plead, and judgment was signed for want of a plea. Execution was subsequently sued out against the defendant, who, on a former day in this term, obtained a rule *nisi* to set aside all the proceedings in this action, on the ground of the insufficiency of the affidavit of debt, and also for irregularity.

*Sir F. Pollock* and *Barstow* now shewed cause. The rule was granted on the ground that it did not appear in the affidavit that the Ripon branch bank had any privileges within the 7 *Geo. 4*, c. 46. But that fact must be inferred from the affidavit, and if any doubt existed, it would appear by reference to the Stamp-office, that the bank is registered

(a) See the last case.

under section 46. *Spencer* is described in this action as the registered officer of the bank, and his name is to be found in schedule A., appended to the act. [*Patteson J.* Still the affidavit is not good, because it states that the money was lent by the deponent, who describes himself as a servant, and a servant has no right to lend money without showing himself to be authorized. An affidavit made by the assignee of a bankrupt, must describe himself as assignee.] If the affidavit does not sufficiently shew that the deponent is the manager of the bank, the question is, how affidavits filed by persons under this act should describe themselves. [*Coleridge J.* How does it appear that this bank is within the statute at all? Should not that fact have been alleged?] The affidavit may be meagre, but it is sufficient, and if it be not strictly correct, still the irregularity is waived, for the arrest took place fourteen days before the end of Hilary term, which gave therefore ample time to take the objection in that term. There has, therefore, been a waiver; *Dent v. Halifax (a)*. As to the declaration, it is said that it ought to have been delivered to the turnkey (the defendant being in custody), but that rule does not apply to a prisoner who has an attorney acting for him. [*Patteson J.* A prisoner has no occasion for an attorney before plea, being already in Court; and as to appearing before a judge on summons by attorney, a prisoner must necessarily appear in that way, and we are bound to hear none but attorneys; but that does not constitute him the prisoner's attorney.] Then the waiver is relied upon.

The *Defendant* in person. I did not discover the defect in the affidavit till after the question of privilege was discussed. [*Patteson J.* I have a distinct recollection of its having been mentioned when the question of privilege was discussed before me and my brother *Alderson* in Serjeant's Inn, and we sent that question to be argued before the

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(a) 1 Taunt. 493.

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Court, where it was heard 29th January.] At all events, the question of time is immaterial, as the affidavit shows that there is no possible title in the plaintiff at all, and the affidavit is therefore a nullity.

As to the declaration, it ought not to have been served on the attorney. (On this point he was stopped by the Court.)

LORD DENMAN C. J.—We are all of opinion that the declaration has been wrongly served, and that there has been no waiver of that irregularity. The application, however, is two-fold, viz. to set aside all proceedings in this action, on the ground of the insufficiency of the affidavit of debt, or at all events, all the proceedings after the service of the declaration. On the first ground I do not think the affidavit is a nullity, though it is certainly open to many objections. Perhaps, according to the strict language of the act (*a*), “that all actions and suits against any person who may be indebted to any such copartnership, carrying on business under this act, shall be in the name of any one of the public officers nominated as aforesaid;” an affidavit like this might be supported. I am not, however, of that opinion, but I cannot say it is altogether a nullity. The affidavit contains a statement that the defendant is indebted to the registered public officer of the bank, and although the connexion of the person making the affidavit with the bank, is not properly shewn, I think that does not make it null, but merely irregular. Being an irregularity, therefore, it may be waived, and the question is, has it been so? Now the defendant made his application first on a question of privilege, and he says that he did not take the objection to the affidavit then, because his attention had not been called to it. But it does not appear in his affidavit when he first discovered this defect, and when we look at the acuteness that has been displayed by the defendant, and the length of time that has elapsed since the

affidavit was made, we think the fact of the time when he first discovered this defect ought to have appeared distinctly on his affidavit, in order to prevent our considering it as having been waived. On the other point, we are clearly of opinion that the delivery of the declaration to the attorney was an irregularity, and that the defendant has had no earlier opportunity to move to rescind the order of my brother *Coleridge*: the declaration, therefore, and subsequent proceedings, must be set aside.

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PATTESON J.—When the point as to the sufficiency of the affidavit was before me at chambers, I certainly thought the affidavit was good; I now think I was wrong in that opinion. If, therefore, the application had been made to me in time to discharge the defendant out of custody on that account, the application would be in time now, as the defendant had a right to appeal from my decision. But the question is, whether he was in time when he made that application, and it having been made so long after the time when the defect might have been discovered, I think the defendant is clearly not in a situation to take the objection at so late a period, as he has omitted to inform the Court when he was first made acquainted with the defect. On the other point, there is no doubt the delivery of the declaration was wrong, because I do not see how, in any case, the delivery to an attorney can be service on a prisoner, unless, perhaps, under some special agreement.

COLERIDGE J. concurred.

Rule absolute to set aside the service of the declaration and subsequent proceedings; discharged as to the rest.



1837.

## The KING v. KOOPS (a).

1. Upon an indictment of perjury, a witness was called to prove the practice of the Insolvent Debtors' Court, which the prosecutor alleged made an affidavit necessary, and upon which perjury had been assigned. The witness produced a printed paper, which purported to be a copy of the rules of the Insolvent Debtors' Court, from which he stated what was the practice. He had no knowledge of the practice independently of the paper. It was held, that such evidence could not be received as proof of the practice.

THE defendant was indicted for perjury. The indictment stated, that the defendant first came into the custody of the sheriffs of London by a writ of ne exeat regno for 1000*l.*, and being in such custody he was detained by a writ of capias out of the Exchequer, and was then removed to the Fleet Prison. That the defendant being such prisoner, and detained in actual custody as aforesaid, within the walls of the last-mentioned prison, under the said writs, heretofore, to wit, &c. in his Majesty's prison situate at &c., appeared before *W. Brown*, Esq. a commissioner of and duly appointed by the said Court for the Relief of Insolvent Debtors in England, for the purpose of taking affidavits therein, and did then and there produce to and before the said *W. Brown*, so being such commissioner, a certain affidavit in writing of the said *J. O. Koops*, in support of the said petition of the said *J. O. Koops*, and concerning the truth of the contents of the said affidavit, and the said *J. O. Koops* then and there before the said *W. Brown*, so being such commissioner, was duly sworn, and did take his corporeal oath upon the Holy Gospel of God, concerning the truth of the contents of the said affidavit, the said *W. Brown* then and there having a lawful and competent power and authority to administer the said oath to the said *J. O. Koops*, and to take and receive his said affidavit in that behalf; and that the said *J. O. Koops*, being so sworn, did then and there, to wit, on &c., falsely, corruptly, knowingly, wilfully, and maliciously depose and swear, and make affidavit in writing, as follows; that is to say, "In the Court for Relief of Insolvent Debtors. In the matter of *J. O. Koops* (meaning himself, the said *J. O. Koops*), a prisoner in the Fleet Prison, in the city of London. *J. O. Koops*, late of No. 214, High Street, in the parish of All Saints, Poplar, in the county of Middlesex, retailer of

(a) This case was decided in Hilary term last.

beer and pawnbroker, the above-named prisoner (meaning himself, the said *J. O. Koops*) maketh oath and saith, that he is now a prisoner in the said gaol, by virtue of a writ of ne exeat regno, issuing out of the Court of Chancery, at the instance of *Edward Brennan*, (meaning the said *Edward Brennan*.) for want of bail or security, in the sum of 1000*l.*, and was, on the 11th day of February, 1834, detained by a writ of *capias*, (meaning the said writ of *capias*,) at the suit of *Solomon Cook*, for the sum of 30*l.*, and was committed to the said gaol on the 21st day of December, 1833, and that he was first committed at the suit of the said *E. Brennan*, upon the aforesaid writ of ne exeat regno, on the 21st day of December aforesaid, to which said writ he deponent has since put in or filed his answer in the High Court of Chancery; and that the following statement hereunto annexed, (meaning the account in the said affidavit contained, and thereafter set forth,) are respectively true," (Here followed a general debtor and creditor account of the defendant's estate, effects and expenditures.) "And that, except as herein set forth, deponent (meaning himself, the said *J. O. Koops*) hath not paid or spent any monies, and hath not spent, sold, parted with, made over, assigned or disposed of any property whatever, since his said first arrest; and that the cause of this deponent (meaning himself, the said *J. O. Koops*) not having presented his petition within the time allowed by the statute, was in consequence of the writ of ne exeat regno, upon which he was committed, not placing him in a situation to apply to this Honorable Court for relief, but on the 11th day of February, 1834, deponent was detained at the suit of *Solomon Cook*, for the sum of 30*l.*, and anticipating he should be enabled to put in the answer required upon his original commitment, he delayed filing his petition, and for no other cause, *J. O. Koops*, (meaning himself, the said *J. O. Koops*,) as by the said affidavit, filed in the said Court for the relief of insolvent debtors in England, reference being thereunto had, will fully appear."

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Perjury was assigned upon the above affidavit and account.

There was a second count, which it is not necessary to set out.

At the trial before Lord *Denman* C. J., at the sittings after Trinity term, in 1835, the defendant was found guilty. By the 7 *Geo.* 4, c. 57, (the Insolvent Debtors' Act,) s. 10, any person in prison for fourteen days may during that period apply to the Insolvent Debtors' Court, by petition, to be discharged from custody, and the act enables any person to apply after the fourteen days, "if the said Court shall in any case think reasonable to permit the same." It was stated at the trial, that by the practice of the Insolvent Debtors' Court, if a person applied for relief after the expiration of the fourteen days, he was to make an affidavit, giving a satisfactory reason for his delay in applying to the Court. He was also obliged to give an account of his estate and effects. The defendant had applied to the Court after he had been imprisoned fourteen days, and he had, in compliance with the practice and rule of the Court, made an affidavit. That was the affidavit in which it was alleged he had perjured himself. To prove the practice of the Insolvent Debtors' Court, Mr. *Sturges*, an officer of the Court, was called, who stated what was the practice of the Court. He made use of a printed copy of the orders of the Court, which he produced. He said he was not aware that there was any original order signed by the commissioners, but by their authority, in a room adjoining to the Court, there was hung up a printed copy of the rules of the Court. He had not compared the printed copy which he had, with the paper in the room adjoining to the Court. He stated that the printed copy which he produced contained, according to his belief, a correct statement of the practice, but that he did not know the practice otherwise than by reading the paper, and that he was in the habit of giving out copies of the rules. This evidence was objected

to, but was received by Lord *Denman*. In Michaelmas term, 1835, *Humfrey* obtained a rule nisi for a new trial, on the ground that the evidence was improperly received; 2dly, that the defendant ought to have been indicted for a misdemeanor, and not for perjury; 3dly, that the paper writing purporting to be annexed to the affidavit, upon which the assignment of perjury was grounded, was not, on the production of such affidavit, annexed thereto, but, on the contrary, produced separate therefrom, and not identified as the paper which was annexed at the time the affidavit was sworn to by the defendant.

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*Erle* and *Moody*, in Hilary term, 1837, shewed cause against the rule. The evidence was properly received. It appeared in evidence, that there was no authenticated record of the rules of the Insolvent Debtors' Court. In this Court, a printed copy of the rules is made use of to ascertain the practice. The practice of the Insolvent Court may be proved by oral testimony, and by persons who are conversant with the practice of the Court, in the same way that the law and practice of the Courts in foreign countries is proved. The practice of a foreign Court may be proved by witnesses; *Ganer v. Lady Lainsborough* (a), *Buchanan v. Rucker* (b), *Beurain v. Sir William Scott* (c). There is no such distinction as primary and secondary evidence with respect to the proof of the practice of a Court. In *Lacon v. Higgins* (d), the law of France was permitted to be proved by the production of a book, which a witness, who produced it, said contained the French code of laws. The book purported to have been published at the royal printing office, which the witness stated was authorized by government to print the laws of France. [*Coleridge J.* In *Dicas v. Lord Brougham* (e), Lord *Eldon*, who was at that time out of office, was called to prove what was the

(a) 1 Peake's N. P. C. 17.

(d) 3 Starkie, 178.

(b) 1 Camp. 63.

(e) 6 C. & P. 249.

(c) 3 Camp. 388.



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practice of the Court of Chancery.] It would be very inconvenient if it be held that it is necessary to call either the commissioners of the Insolvent Debtors' Court, or any officer of the Court. In *Boehtlinck v. Schneider* (a) it was held, that where the law is in writing, a copy of that writing may be produced. The making of the affidavit by the defendant shews, that by the practice of the Insolvent Debtors' Court, such an affidavit is required.

It has been assumed that the materiality of that which was shewn to be false would depend on the practice being proved, but that false statement might be material independently of the practice. The defendant was asking a favour of the Insolvent Debtors' Court, to be allowed to file his petition after the usual time. To induce the Court to grant him this favour, he makes an affidavit, which contains a false statement. There is no averment in the indictment that the practice of the Court required the affidavit. The Court, by their general authority as a court of justice, had authority to administer the oath. [*Williams J.* It was necessary to shew that the false statement was in a judicial proceeding.]

*Humfrey*, contra, was stopped by the Court.

Lord DENMAN C.J.—The Court for Insolvent Debtors had no jurisdiction to administer an oath, except under the practice of the Court. It has been ingeniously argued, that the Court had jurisdiction under the general power given to them by the statute. We cannot, from the general language of the statute, infer such a jurisdiction. The question in the case then is, has the practice of the Court been properly proved? A printed copy was produced, which was not authenticated. If the rules are written, there was nothing to connect the printed paper produced with any original, issued or suspended by order of the Court. It is clear the witness could not prove the practice without the printed copy.

(a) 3 Esp. 58.

WILLIAMS J.—Mr. *Moody*, in endeavouring to get rid of the objection, made an assumption of the whole question, viz. that the affidavit was made in the course of a judicial proceeding. The witness did not vouch the practice from his personal experience. He had acquired his knowledge from some written paper, which was not shewn to be any rule of the Court.

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COLERIDGE J.—It appears from the indictment, that the defendant had presented a petition to the Insolvent Debtors' Court, and made an affidavit in support of it, and that that affidavit was false. It was incumbent on the prosecutor to shew that the affidavit was material, and to do that, it was necessary to prove the practice of the Court. That practice is either written or unwritten. Take it either way, it was not proved in this case. Which was the evidence given? A person was called, who produced a paper purporting to be a printed copy of the rules of the Court. He did not know the practice. He said he was in the habit of giving out printed copies of the rules, but he had not compared the copy produced with any printed rules. There was therefore no sufficient evidence of any written rules. Suppose the practice was unwritten, the witness did not know the practice of his own knowledge. As at present advised, not knowing whether the practice was written or unwritten, I should be inclined to think that the practice might be proved by a person acquainted with it. In this case the witness had no knowledge of his own, but relied on the printed paper. This evidence was therefore inadmissible.

Rule absolute.

END OF EASTER TERM.



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2. Under sect. 81 of the Poor Law Amendment Act (4 & 5 Will. 4, c. 76,) delivery of the statement of grounds of appeal against an order of removal, to an attorney acting on behalf of the overseers of the respondent parish, is insufficient. *The King v. Kimbolton.* 606

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2. A party who lived in the country came up to attend a meeting before an arbitrator on the 6th of January. The meeting took place on the 7th, and the opposite party gave notice that they would not proceed with the reference, but apply to the Court in Hilary term to set it aside. The arbitrator adjourned the hearing of the reference until the 15th of February. The party remained in London until the 16th of January, not having pecuniary means to return, and waiting to see if any motion would be made. No motion was made, and as he was proceeding to take his place on the 16th to return home, he was arrested. It was held that he was not privileged from arrest. *Ibid.*

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## CHURCH.

1. The 59 *Geo.* 3, c. 134, s. 40, authorizes churchwardens, for the purpose of rebuilding or enlarging parish churches, to borrow money upon credit of the church rates, and to make rates for payment of the interest of the sum borrowed, "and for providing a fund of not less than the amount of the interest of the sum advanced for the repayment of the principal thereof, or for repaying such principal, in such manner and at such times, and in such proportions as shall be agreed upon with any person advancing such money." A. lent to the churchwardens of B., under the above act for rebuilding a church, 1000*l.* at 5*l.* per cent., and agreed not to call in the principal for 20

years:—Held, that the act was compulsory on the churchwardens to raise annually a sum equal to the amount of the interest, as a fund for the repayment of the principal, although A. could not compel the repayment of the principal until the expiration of the 20 years. *The King v. The Churchwardens of St. Michael's, Pembroke*. 69

2. The churchwardens may use the fund raised annually for the liquidation of the principal, for the benefit of the parish. Per Lord Denman C. J. *Ibid.*

## CHURCHWARDEN.

Mode of electing.

See ELECTION, I.

## COMMON.

Where a party is possessed, as appurtenant to a messuage, of the sole right of pasturage for sheep on a common, he has no right to feed there the sheep of others, taken "on tack;" therefore on an issue as to such a right of pasturage in the plaintiff, evidence of his having depastured there, unmolested, the sheep of others, taken "on tack," though admissible, is not evidence of the right, as it tends to shew a usurpation only. *Jones v. Richards and others*. 747

## COMMISSIONERS.

Liability of under a Paving Act.

See ACTION, III. 2.

## COMPENSATION.

### I. Under the Municipal Corporation Act.

1. The word "office" is used in the act in a popular, not in a legal sense. *The King v. The Mayor of Bridgewater*. 466
2. In the borough of B., the common clerk exercised the functions of clerk to the justices. The same person had always filled both places. On the passing of the 5

& 6 *Will.* 4, c. 76, the common clerk was appointed town clerk, but the provisions of the act prevented the town clerk from acting as clerk to the justices:—Held, that he was entitled to compensation, under sect. 66, for the loss of an office under the provisions of the act. *The King v. Mayor of Bridgewater.* 466

3. The Court will not grant a quo warranto information, moved for in order to contest an officer's right to compensation. *The King v. Harris.* 576

#### II. How enforced.

1. When the Lords of the Treasury make an order on the town council of a borough, to grant compensation to a party, and the town council neglect to comply with the order, the Court of K. B. will enforce it by mandamus. *The King v. The Mayor, &c. of Bridgewater.* 466

#### III. Under the General Turnpike Act, 3 Geo. 4, c. 126.

1. Where a jury is impanelled under the General Turnpike Act, 3 Geo. 4, c. 126, to assess the value of the land taken by the trustees, belonging to B., C., D. and E., respectively, who are separately interested as lessees, the jury must find, and the inquisition must specify, the sum to which each is respectively entitled. *The King v. Trustees of the Norwich and Watton Roads.* 32
2. Certiorari to remove proceedings under this act.

See CERTIORARI, III.

#### IV. Under Railway Acts.

See COSTS, III. 1.

#### V. Mode of recovering.

*Quære*, Whether the verdict of a compensation jury, declared to be a record of quarter sessions, can be sued for in debt.

See MANDAMUS, I. 3, 4.

### CONSIDERATION.

What amounts to. See FRAUDS.

### CONSTRUCTION.

#### I. Of Charters.

See ELECTION, II.

1. The word "inhabitant" has no definite legal meaning, but it is to be construed according to the subject-matter with which it is connected. *The King v. Mashiter.* 314
2. Same point. See *The King v. The Governors of Sandford.* 328
3. *Semble*, the grant to the tenants and inhabitants of a manor, of various privileges, such as the right not to be impleaded out of the manor, the right to elect a justice of the peace, the grant of a fair, of a court of pie-poudre, &c., does not by its context shew that the word "inhabitants" means all who have come into the manor animo morandi. *The King v. Mashiter.* 314

#### II. Of Statutes.

1. The word "office," in the 5 & 6 *Will.* 4, c. 76, s. 66, is used in a popular sense, and does not mean an office in its strict legal sense. *The King v. The Mayor, &c. of Bridgewater.* 466
2. Church Building Act.  
See CHURCH, 1, 2.
3. Gaol Act, 14 Geo. 4, c. 64. See LONDON.
4. Municipal Corporation Act, (5 & 6 *Will.* 4, c. 76). See CORPORATION — MANDAMUS, I. 5, 13 — QUO WARRANTO.
5. Poor Law Acts. See PARISH — POOR, II. 3.
6. Of contracts entered into by trustees under paving acts. See ACTION, III. 1, 2.
7. Of road acts. See HIGHWAY, I. 3; II. III.
8. Of inclosure acts. See INCLOSURE.

**CONTRACT.**

See ASSUMPSIT, I. 2.

*By Booking-office Keeper.*

The contract entered into by a booking-office keeper, who takes in parcels to be forwarded by carriers, is only to deliver safely to a carrier. *Gilbart v. Dale.* 22

**CONTUMACE CAPIENDO.**

See ECCLESIASTICAL COURT.

**COPARCENERS.**

See DESCENT.

**COPYHOLD.****I. Right to Admission.**

Where there are two claimants by different titles, to a copyhold tenement, the lord must admit both. *The King v. Hexham.* 53

**II. Materiality of Lord's Title.**

The legality of the title of the lord or steward, who admits a copyholder, is immaterial, provided the admission is in pursuance of a surrender, and not of a voluntary grant from the lord. *Doe v. Thompson.* 215

**III. A legal Custom for one to take Surrenders concurrently with the Steward of the Manor.**

The castle of F., being parcel of the manor of F., a custom of the manor for the clerk of the castle, who was appointed by the lord of the manor to take surrenders of copyholds in the castle of F., concurrently with the stewards of the manor, is a legal custom. *Doe v. Mellish.* 30

**CORPORATION.**

See COMPENSATION, I. 1, 2, 3; II.—MANDAMUS, I. 5, 13—QUO WARRANTO, I. 1, 2; II. 2.

*Disqualification for Councillor.*

A bankrupt uncertificated at the time of election, is not disqualified from

being elected a councillor, under the Municipal Corporation Act. The disqualification exists only where the bankruptcy occurs during the holding of the office. *The King v. Chitty.* 78

**COSTS.****I. For Malicious Arrest.**

1. Arrest for 20*l.* 2*s.* 1*d.*, for price of goods sold. Plea: infancy. Replication: that the goods were necessaries. At the trial the plaintiff succeeded in proving the delivery of certain articles only in his bill of particulars, and got a verdict for 10*l.* On an affidavit of the defendant, that he never owed the plaintiff 20*l.*, the Court gave him his costs, under 43 *Geo.* 3, c. 46, notwithstanding the plaintiff swore that all the articles in the bill of particulars were delivered to the defendant. *Ballantine v. Taylor.* 219

**II. In Criminal Proceedings.**

1. The Court of King's Bench has no power to award costs in criminal proceedings in a court below, although those costs may have been incurred by the defendant's improperly suing out a certiorari, which was afterwards quashed. *The King v. Higgins.* 50

**III. Under Railway Acts.**

1. Where a railway act authorized the company to take lands of individuals, making compensation for the same, and enacted that if disputes should arise as to the price, the value was to be settled by a jury; and in case the jury should give a greater sum than had been offered by the company, "all the costs of summoning the jury and the expenses of the witnesses," were to be defrayed by the company; but if the jury should give the same or a less sum than had been offered, one moiety of the said costs and expenses was to be

defrayed by the party to whom the lands belonged; and a subsequent clause enacted, that the party with whom the company should have any dispute, should enter into a bond to pay his "proportion of the costs and expenses of summoning and returning such jury and taking such verdict, and of the summoning and attendance of witnesses," in case any part of such costs should fall upon him:—Held, that the words "the costs of taking such verdict," did not mean the costs of trial, and that the fees of counsel and the costs of the attorney, respecting the preparing for and attendance at the trial, were properly disallowed. *The King v. Gardner.* 308

IV. *Security given for, by Plaintiff abroad.*

See PRACTICE, V. 1.

V. *On New Trial granted.*

1. A verdict was found for the plaintiff. A new trial was subsequently granted, on the ground that some evidence had been improperly received. The defendant then withdrew his plea, after the plaintiff had applied for a special jury, and suffered judgment by default, and the damages were assessed. The rule for a new trial was silent as to the costs of the first trial:—Held, that by reason of the rule 64, Hil. T. 2 *Will.* 4, the plaintiff was not entitled to the costs of the first trial. *Peacock v. Harris.* 240

VI. *Liability of Bail to.*

See BAIL.

COUNTY.

*Inspection of County Rates.*

See RATE, II.

COURT (ECCLESIASTICAL).

See ECCLESIASTICAL COURT—PROHIBITION, 1, 2, 3.

COURT (COUNTY).

*Practising as Attorney, without having taken out Certificate.*

See ATTORNEY.

COVENANT.

I. *General Covenant restricted by subsequent qualified.*

1. *J. L.*, who was possessed of a term for years, provided *C.* should so long live, assigned the term, and covenanted, that notwithstanding any act, deed, matter, or thing done by him, at any time theretofore, the lease was at the time of the assignment a good, valid and effectual lease; and that the same, and the term of eleven years therein expressed, was in full force and effect, and in nowise forfeited, surrendered, assigned, determined, or otherwise become void or voidable, or prejudicially affected in any manner whatsoever, otherwise than by the effluxion of time; and also that for and notwithstanding any such act, he the said *J. L.* had full power to assign, &c. Before the assignment, *C.* had died, and *J. L.* knew the fact:—Held, that the covenant of the lease being valid and not determined, was qualified by the preceding covenant, and restrained to any acts done by *J. L.*, and that therefore he was not liable upon this covenant for an eviction by the party entitled on *C.*'s death. *Stannard v. Forbes.* 633

II. *Covenant for quiet Enjoyment.*

1. After the death of *C.*, *J. L.* paid rent to the party entitled on *C.*'s death:—Held, that this did not amount to an act done by *J. L.*, so as to forfeit the lease, by converting the term into a tenancy from year to year, because the lease had already expired by *C.*'s death. *Ibid.*

## CRIMINAL INFORMATION.

*When granted.*

A rule nisi for a criminal information for a libel, was discharged, on an affidavit made by a person who swore to the truth of the libel. This person was indicted for perjury, the bill was found, and he absconded. It appeared from the affidavits of several persons, that the former affidavit was entirely untrue. The Court, under these circumstances, granted another rule nisi for a criminal information, and made it absolute. *The King v. Eve.* 229

## CRIMINAL LAW.

*Proper Number of Grand Jury.*

See JURY, 1.

## CUSTOM.

I. *As to Custom for affording an Exposition of ancient Charters.*

See ELECTION, I. 4, 5.

II. *Custom to take Surrenders in a Manor.*

See COPYHOLD, III.

III. *What Customs valid.*

1. *Seemle*, that a right in the occupier of an ancient messuage to take water at a pond, for the use of his dwelling, may be claimed by custom. *Manning v. Wasdale.* 172
2. A custom for all victuallers to erect booths on a common, being parcel of the waste of a manor, selected by the lord for holding fairs yearly, every fortnight, a reasonable time before the Monday next after the feast of Pentecost, and to continue them so erected until the feast of All Souls, is good. *Tyson v. Smith.* 784

## DEBT.

*Whether it can be maintained on a Judgment of Quarter Sessions.*

See ACTION, III. 3.

## DEBTOR AND CREDITOR.

See ASSUMPSIT, I. 2—FRAUDS.

## DECLARATION.

See PLEADING, I.—PRACTICE, VI.

## DEFAMATION.

See CRIMINAL INFORMATION.

1. Privileged communication may be given in evidence without pleading it. *Lillie v. Price.* 16
2. Communications made by one member of a charitable association to another, reflecting on the conduct of the medical attendant of the establishment, are not privileged. *Martin v. Strong.* 29

## DESCENT.

*Partition by Deed.*

*A.* and *B.* being seised of land in coparcenary, *B.* conveyed his moiety to a purchaser in fee. The purchaser, and *A.* the other parcener, made partition by lease and release, and conveyed the whole to *H.* and his heirs as to one portion, to the use of *B.* in fee, as to the other portion to the use of *A.* in fee: held, that *A.*'s portion remained descendible to his heir ex parte materna. *Doe v. Dixon.* 255.

## DEVISE.

I. *What Words pass an Estate in Fee.*

1. A testator devised that his debts and funeral expenses should be paid by his executor. He then bequeathed two annuities, and gave five shillings to his heir at law, and then followed these words:—"I appoint *W. P.* my whole and sole executor of all my houses and land situate at *F.*" It was held, that an estate in fee passed by this devise to *W. P.* *Doe v. Pratt.* 366
2. A testator devised as follows:—"I give unto my wife, her heirs and assigns, for ever, all the residue of my goods, chattels, and personal

estate, whatsoever and wheresoever, and also all my right, title, and interest, of, in, and to all and every sum and sums of money whatever, which now is, are, or shall be due to me upon and in virtue of any bill, bond, or other securities. I do likewise make my wife full and sole executrix of the freehold house situate in Great Queen Street, in the parish of St. Giles." By this devise a fee simple in the house passed to the wife. *Doe v. Haslewood.* 852

## II. What Words pass an Estate for Life.

1. A testator by his will, after giving a life estate to *J. J.*, in certain lands, devised as follows :—"As to all other freehold estates in the county of B., to the use and intent that *A. B.* or *C. D.*, their executors and administrators, or the executors and administrators of the survivor of them, shall and may receive and take the rents, issues, and profits of the above-mentioned estates, and pay the same to my son *J. J.*, for life, and from and after his decease, I devise the same to the heirs of the body of my said son," &c. It was held, that by this devise the legal estate was vested in *A. B.* and *C. D.* during *J. J.*'s life. *Doe v. Homfray.* 401
2. A testator seised of freehold land, after giving several pecuniary legacies, devised as follows ;—"I give unto *W. L.*, and *A.* his wife, for and during their natural lives, all and every my messuages, lands and tenements, hereditaments and premises whatsoever, in the city of N., or elsewhere, in the kingdom of Great Britain ; and from and after the decease of the said *W. L.* and *A.* his wife, my mind and will is, the said messuages, lands and tenements, hereditaments and premises, shall be equally divided unto and amongst such of

the children of the said *W. L.* and *A.* his wife as shall be then living." The will then disposed of the residue of the personal estate. It was held, that the children took only life estates as tenants in common, and not estates in fee. *Silvery v. Howard.* 346

## III. By Will, how cancelled.

See WILL.

## EASEMENT.

1. A right in the occupier of an ancient messuage to water his cattle at a pond, and to take the water thereof for domestic purposes, for the more convenient use of his messuage, is an easement, and not a profit à prendre in the soil of another. *Manning v. Wadale.* 172

## ECCLESIASTICAL COURT.

See CHURCHWARDEN—PROHIBITION, 1, 2, 3.

1. The writ de contumace capiendo must be addressed to the sheriff of the county of which the party contumacious is described in the significavit; and if addressed to the sheriff of a different county, the Court will quash the writ. *The King v. Ricketts.* 680
2. A writ de contumace capiendo reciting a significavit by two judges, of disobedience to the commands of three judges, is bad, and the Court will quash it on motion. *The King v. Ricketts.* 685
3. A writ de contumace capiendo issued to the sheriff of N., reciting a significavit, in which the defendant is described as now or heretofore of a certain parish in the county of K., is bad. *The King v. Hewitt.* 689
4. Such a writ may be quashed on motion before the return-day, and if the defendant have been arrested on it, it is not necessary to bring him into Court by habeas corpus. *Ibid.*

## EJECTMENT.

See ADVERSE POSSESSION, 1, 2—  
LANDLORD AND TENANT, I.

*Where Notice to Quit not necessary.*

Where *J.*, who was tenant at will to *W.*, died, and the defendant, who was heir at law to *J.*, entered into possession, and claimed the land as his own:—Held, that the devisees of *W.* might bring an ejectment against the defendant without giving him notice to quit or demanding possession. *Doe v. Thompson.* 215

## ELECTION.

I. *Parish Officers.*

1. The right to demand a poll is by law incidental to the election of a parish officer by show of hands, where there is no special custom to exclude it. *Campbell v. Maund.* 558
2. A poll at an election need not be demanded until after the decision of the chairman upon the show of hands. *Ibid.*
3. Where a poll has been demanded to be held according to a particular mode, and has been held accordingly without any objection being made, any irregularity in the mode demanded, is waived. *Ibid.*
4. *Sturges Bourne's Act* (58 Geo. 3, c. 69,) giving a plurality of votes to rate-payers, according to their rating, exempts (s. 8,) from its provisions, any vestry holden by virtue of any special act, or of any usage or custom. The local parochial act for Paddington (5 Geo. 4, c. 126,) enacts, that the election of churchwardens shall be conducted from year to year, in such manner as hath been usual in the same parish. It was proved in evidence, that the mode of electing churchwardens had been by a show of hands, no poll ever having been demanded:—Held, that this was

no evidence of a custom to exclude the granting of a poll, when properly demanded, and therefore that the mode of electing churchwardens in Paddington, before the 58 Geo. 3, was by show of hands, with a power of going to a poll, in which case single votes carried the election, and that *Sturges Bourne's Act* having given each voter a plurality of votes, according to his estate, a show of hands, with the power of demanding a poll and plurality of voting, was the mode of election at the time of passing the local act (5 Geo. 4), and continued by it (s. 111). *Ibid.*

5. The provision in a local act providing that the election of churchwardens shall be conducted in such manner as has been usual, applies to customary elections de facto, without reference to their conformity with the general law. *Ibid.*

II. *Under Charters.*

1. Where a charter of *Edw. 6*, granted to the governors of a corporation the right of nominating and appointing, unâcum assensu majoris partis inhabitancium of the vill of of *S.*, a chaplain to perform divine service in the said vill:—Held, that a usage for the governors to nominate a chaplain and to give notice to the inhabitants to meet at a future day, and to assent or dissent to the nomination so made, was not inconsistent with the words of the charter. *The King v. Governors of Sandford.* 328
2. Who are inhabitants, *Ibid.* and *The King v. Mashiter.* 314

## EQUITY OF REDEMPTION.

The assignees of a bankrupt cannot, under s. 70 of the Bankrupt Act, 6 Geo. 4, c. 16, acquire the legal estate in premises mortgaged by the bankrupt, after the day of payment mentioned in the condition

is passed, by making tender to the mortgagee of the mortgage-money and interest. *Dunn and Howes v. Massey*. 578

## ESTATE.

### I. *At Will*.

See ADVERSE POSSESSION, 1, 2.—  
COVENANT, II.—EJECTMENT—IN-  
CLOSURE.

### II. *For Years*.

See LANDLORD AND TENANT, I.—  
LEASE.

### III. *For Life*.

See DEVISE, II.

### IV. *In Fee*.

See DEVISE, I.

## ESTOPPEL.

*Vendor estopped from disputing Pur-  
chaser's Title.*

1. Defendant sold to plaintiff a parcel of wheat, being then in the warehouse of *B. and W.*, agents for defendants. By defendant's direction, *B. and W.* transferred the wheat in their books to the name of plaintiff. The wheat remained in their possession. Subsequently to the transfer, defendant received notice from one *J. M.* that the purchase of the wheat was on the joint account of himself and plaintiff, and requiring him not to deliver it to plaintiff. *J. M.* afterwards became a bankrupt, and his property vested in assignees, who gave similar notice to defendant. In consequence of these notices, defendant directed *B. and W.* not to deliver it, and *B. and W.* refused samples when applied to by plaintiff. To trover for the wheat defendant pleaded, that *L. M.* and *T. H.*, the assignees of *J. M.*, were jointly interested with plaintiff in the wheat, and that the supposed conversion took place by

their leave with licence. Replication, that *L. M.* and *T. H.* were not jointly interested.—Held, that the property in the wheat passed to the plaintiff by the transfer in the books of *B. and W.*, and that it was not competent to the defendant to give evidence that other parties were jointly interested with him. *Kieran v. Saunders*. 625

2. See also the case of an agent estopped from setting up that a contract was made on behalf of his principal.

See PRINCIPAL AND AGENT, 2.

## EVIDENCE.

### I. *Admissions*.

1. Payment of money into Court in an action of debt, by an attorney, for work and labour done, and money laid out and expended, admits that the plaintiff was employed as an attorney, but not that he was to receive the usual attorney's fees, and therefore under *nunquam indebitatus ultra*, the defendant may prove that the contract was for the plaintiff to conduct the suit for the money actually disbursed by him. *Jones v. Reed*. 18

### II. *Public Writings*.

1. A charter-party was entered into at Java. By the law of Holland, which is the law enforced there, the parties upon entering into such a contract go before a notary public; he makes an entry in his books, which the parties sign, and he makes out copies from time to time when requested, which he delivers to the parties. These copies are received in evidence in the Courts of Holland, but at Java, the notary's book itself must be produced. These copies cannot be received in evidence in the Courts in England, (no proof being given when they were made) either on the ground of the notary being a public officer,



whose duty it was to make copies, or of his being the agent of the parties by whose acts they had agreed to be bound. *Brown v. Thornton.* 339

### III. *Private Writings.—Hand-writing.*

1. Evidence of hand-writing by comparison is inadmissible, except either where the writing acknowledged to be genuine is already in evidence in the cause, or the disputed writing is an ancient document. These exceptions are of necessity. *Doe v. Newton.* 1
2. It is not necessary to prove the execution of a deed, if the adverse party claims under it, and this rule applies where secondary evidence is given of the deed. *Doe v. Wainwright.* 8
3. Nor is it necessary to prove livery of seisin to a feoffment, where the adverse party claims under the feoffee. *Ibid.*
4. It is sufficient evidence of B.'s claiming under a conveyance, to dispense with proof of the execution of the deed by the subscribing witness, to shew that A., an attorney, was in possession of the property, and of the conveyance; that he sold it to B., and that upon that occasion the conveyance was handed over to B. *Doe v. Wainwright.* 8

### IV. *Evidence of Reputation.*

1. Where on an issue as to the boundary of a tenement, evidence has been given that the boundary in question is the same with the boundary of a certain hamlet, evidence of reputation as to the boundary of that hamlet is then receivable as proof of a fact relevant to the issue. *Thomas v. Jenkins.* 587

### V. *Primâ Facie Evidence.*

1. The insertion of the name of a town in schedule A. of the Municipal Corporation Act, is primâ evidence of the existence of a mu-

nicipal corporation there. *The King v. Greene and others.* 631

2. How it may be rebutted. *Ibid.*
3. The insertion of the name of a town in schedule A. of the Municipal Corporation Reform Act, is primâ facie evidence of the existence of a municipal corporation there, but if facts be adduced on affidavit to negative that presumption, a mandamus will not issue to compel the delivery of books, papers, monies, &c. by the ancient officers of the town to the council elected under the new act. *Ibid.*

### VI. *To prove the Practice of a Court.*

1. Upon an indictment of perjury, a witness was called to prove the practice of the Insolvent Debtors' Court, which the prosecutor alleged made an affidavit necessary, and upon which perjury had been assigned. The witness produced a printed paper which purported to be a copy of the rules, from which he stated what was the practice. He had no knowledge of the practice independently of the paper. It was held, that such evidence could not be received as proof of the practice. *The King v. Koops.* 828

### VII. *In particular Actions.*

#### *Case against Carriers.*

1. In an action on the case against the keeper of an office for the booking and forwarding of parcels, where the declaration alleges that a parcel was delivered to D., and that he promised to take care of it, that it might be forwarded to its destination, and avers that it was lost through his negligence, on which issue is joined. It is not sufficient evidence of negligence to shew that the parcel was delivered to D., and it had that not reached its destination. *Gilbart v. Dak.* 22
2. In assumpsit against a father for goods furnished to his son, an infant, See INFANT.

**VIII. For Evidence under particular Pleas.**

See **NEW RULES.**

**IX. At Sessions under Statement of Appeal.**

See **APPEAL**, IV. 1, 3, 4, 5.—**SESSIONS**, I. 1, 2.

**EXECUTOR.**

See **PROHIBITION**, 1.

**FEE.**

*What words pass a Fee.*

See **DEVISE**, I.

**FEOFFMENT.**

See **EVIDENCE**, III. 3.

**FRAUDS, STATUTE OF.**

A suit in Chancery was pending between *A.* and *B.*, which *C.* conducted for *A.* as *A.*'s attorney. An agreement was made between *B.* and *C.*, with the consent of *A.*, purporting that in consideration of the suit being put an end to, *B.*, the defendant in equity, promised to pay *C.*, the attorney, the costs due to him from *A.*, the plaintiff in the Chancery suit;—Held, that this was an agreement by *B.*, the defendant, to pay the debt of another, and therefore that it ought to be in writing. *Tomlinson v. Gell.* 588

**GAOL.**

See **LONDON.**

**GRAND JURY.**

See **JURY**, 1, 2, 3.

**HEIR.**

See **DESCENT.**

**HIGHWAY.**

**I. Liability of Parish to repair Highway.**

1. In a plea by a parish to an indictment

for the non-repair of a highway, they must shew not merely that they are not liable, but who is liable to repair it. *The King v. Inhabitants of Eastington.* 193

2. A plea to an indictment against a parish, for the non-repair of a highway, alleged, that within the parish, from time immemorial, there was a township of *E.*; that part of the highway was within the township of *E.*, and that the inhabitants of the said township, from time immemorial, ought to have repaired, and still of right ought to repair, all the common highways within the said township that would be otherwise repairable by the inhabitants of the parish at large; and that the inhabitants of the parish had not repaired, and ought not to repair, the highway within the township. The plea concluded by stating, that by reason of the premises the inhabitants of the township ought to have repaired the highway, and that the inhabitants of the parish ought not to be charged with the repairing. But it did not state that the road was one which, but for the custom, the parish would be liable to repair. The replication took issue on the custom. At the trial, the defendants were found not guilty.—Held, first, that the Crown was not entitled to judgment non obstante veredicto, because it did not appear that the parish was liable; second, that judgment ought to be arrested for want of the above averment.

*Ibid.*

3. The preamble of an act, which authorized the making of a main line of road and several branches, recited that the making of the main line and branches would be advantageous to the neighbourhood and the public. The making of all the branches, as well as of the main line, is a condition precedent to any portion of the un-

dertaking, as well the main road as the branches, becoming highways; and therefore where one branch remained unmade, although the main road was completed, a district liable by prescription to maintain all highways within it, and through which a portion of the main road passed, was held not liable to repair that portion of the main road lying within it, so long as all the branch roads were not complete. *The King v. Inhabitants of Cumberworth.* 197

4. Where township A. was liable by custom to repair the highways within it, and was indicted for non-repair, the defence set up was, that township B. was liable, and an agreement was produced, made between the owners of the soil of the two townships in 1591, by which the owner of township B. agreed to repair the roads in township A., and it was agreed that a lawyer should be elected to carry the agreement into effect. It was proved also that township B. had repaired the road up to within a short time of the trial:—Held, that on such evidence it was not incumbent on the judge to leave it to the jury to presume that legal instruments had been executed, casting the liability on township B. *The King v. Inhabitants of Scarisbrick.* 582

## II. Stopping up a Highway.

1. An order of justices, under 55 Geo. 3, c. 68, stopping up more than one highway, is void. *The King v. Inhabitants of Milverton.* 179
2. Such an order, stopping up part only of a highway, is void. *Ibid.*
3. Justices have no authority to narrow a highway. *The King v. Inhabitants of Milverton.* 179
4. *Semble*, Justices have no power to stop up a road out of the division or hundred for which they act. *Ibid.*

## III. Diverting a Highway.

1. An order of justices, under the 55 Geo. 3, c. 68, for diverting a public footway and substituting a new one, which contains also an order for the stopping up the old footway, is void. There should be two separate orders; the one for diverting, the other for stopping up. *The King v. Justices of Middlessex.* 92

## HUSBAND AND WIFE.

### I. Liability of Husband.

1. Assumpsit, in the absence of an express promise, cannot be maintained against the husband for money either lent to the wife to conduct, or actually laid out by a stranger in conducting, at the wife's request, an indictment against the husband for an assault upon his wife. *Grindell v. Godmand.* 168

### II. Where Husband and Wife may sue jointly.

1. A declaration in trover, brought by husband and wife, dated 1836, stated, that before the marriage of the plaintiffs, by an indenture made between L. of the one part, and the wife of the other part, L. assigned unto the wife certain household furniture mentioned in an inventory annexed to the indenture, as her own property, provided that in case the said L. should pay the wife 95*l.* on the 29th of October, 1837, or on such earlier day as the wife should appoint by writing, and should in the mean time, until the repayment of the principal, pay interest thereon, the indenture should be void. The declaration then stated that the plaintiffs had not obtained possession of the furniture, and that the said plaintiffs were, on &c., lawfully possessed of the inventory, and being so possessed, lost it.

The declaration then stated a finding of the inventory, and conversion by the defendant. To this there was a demurrer, because the wife was joined.—It was held, that the husband might either sue separately or join his wife. *Ayling and Wife v. Whicher.* 416

### INDENTURE.

See POOR, III. 2.

### INDICTMENT.

See HIGHWAY, I. 1, 2.—JURY.

### INCLOSURE.

*Construction of Inclosure Act.*

Where a local inclosure act, (51 Geo. 3, c. 25,) for inclosing certain open fields, provided that the several lands and grounds to be awarded and allotted to the several persons concerned, and the several messuages, lands, &c. which should be exchanged in pursuance of that act, or of the General Inclosure Act, (41 Geo. 3, c. 109,) immediately after such allotments and exchanges were made, should be, remain, and enure to the several allottees who shall from thenceforth stand and be seised and possessed thereof, to such and the same uses, estates, trusts and purposes, as the several messuages, tenements, &c. in lieu of which the allotments were made, were held by:—Held, that an allottee, on being put in possession of an allotment by the commissioners under the act, acquired, immediately and before any award was executed, the same legal estate in it as he had in his ancient messuage. *Doe v. Saunders.* 119

### INFANT.

*Liability of Father for Contract of.*

Where a father has seen his son (a boy of 14) wearing a suit of clothes,

it is a question for the jury, whether he authorized the purchase of them. *Law v. Wilkins.* 697

### INHABITANT.

See CONSTRUCTION, I. 1, 2, 3.

### INQUISITION.

*Inquisition of Compensation Jury, Form of.*

1. The inquisition should set out the notice given to the parties, of the intention to impanel a jury, *semble.* *Rees v. Trustees of Norwich and Watton Roads.* 32
2. A defect in the inquisition cannot be remedied by any subsequent proceeding. *Ibid.*  
See COMPENSATION, II. 1, 2.

### INSURANCE.

#### I. *Construction of Conditions in a Policy.*

1. Where there was an insurance against fire on a granary, with a kiln for drying corn attached, and the third condition indorsed on the back of the policy stated, that unless the trades carried on in the insured premises be accurately described, and if a kiln or any process of fire-heat be used and not noticed in the policy, the policy was to be void; and the sixth condition stated, that if the risk to which the insured premises were exposed should be by any means increased, notice was to be given to the office, and allowed by indorsement on the policy, or otherwise the insurance to be void. A cargo of bark having sunk near the premises of the plaintiff, who was the insurer, he allowed the bark to be dried at his kiln gratis, and in consequence of the fire at the kiln, during this process, which lasted three days, the premises were burnt down. In an action against

the insurance office, the jury having found that drying bark was a more dangerous trade than drying corn,—Held, first, that a user of the corn kiln for a different purpose from that intended at the time of making the policy, was not a misdescription or omission within the meaning of the third condition; secondly, that a single user of the corn kiln, as a bark kiln, gratis, was not such an alteration or increase of risk as required notice to be given at the office; thirdly, that the two conditions taken together did not amount to a warranty that the plaintiff would not use the kiln for other purposes than drying corn; fourthly, that although the fire is occasioned by the negligence of the assured himself, he not being guilty of fraud, may recover. *Shaw v. Robberds and others.* 279

2. In a policy of insurance against fire, upon cotton mills, "it was warranted that the said mills were brick built, and stated that they be warmed and worked by steam, lighted by gas, *worked by day only.*" It was held, that the stipulation that the mills should be worked by day only, meant that the usual cotton manufacture carried on by the mills in the day time should not be carried on at night, and that it was, consequently, no breach of this warranty, that on one occasion, in order to turn machinery in an adjacent building, the steam-engine, (which was not in the mill, but in an adjoining building,) and certain perpendicular and horizontal shafts in the mill, were at work. And that a plea to a declaration on the above policy, that a certain steam-engine and certain perpendicular and horizontal shafts, *then being respectively parts of the said mills*, were, without consent of the defendants, worked by night, was bad. *Mayall v. Mitford.* 732

## II. Consolidation of Actions.

Where sixty actions were pending on a policy on a ship, which had been insured to a very large amount, and a consolidation rule had been entered into, in which the plaintiff and the other defendants agreed to be bound by the decision in this action, the plaintiff having recovered a verdict, on which a rule nisi had been obtained in the King's Bench for a new trial, the Court refused to order the defendant to pay the amount recovered against him into Court, or to invest the same, upon the ground that the great arrear of causes in the new trial paper would prevent the rule nisi coming on for argument for a long time, and that the losses and risk of the plaintiff were thereby greatly increased. *Okry v. Dunbar.* 244

## JUDGE.

*Misdirection of.*

See MISDIRECTION.

## JURISDICTION.

*Plea to the Jurisdiction.*

See PARSON.

## JURY.

### I. Grand Jury.

1. A grand jury ought not to consist of more than 23 persons. *The King v. Marsh.* 187
2. Where more than 23 persons are sworn upon a grand jury, and a bill of indictment is found by them, to which a defendant pleads, and is tried and found guilty, the Court of King's Bench will not, upon motion, quash the indictment. *Ibid.*
3. If more than 23 are sworn upon the grand jury, the defendant in an indictment found by them may, if that fact appears upon the caption of the indictment, bring error in

- law. If it does not appear there, then he may bring error in fact. *The King v. Marsh.* 187
4. The Court of King's Bench will not receive an affidavit of a grand juror as to what passed in the grand jury room, upon the subject of a bill of indictment. *Ibid.*

### JUSTICES.

#### I. Jurisdiction of.

A magistrate has no authority, by the 6 Geo. 3, c. 25, to determine disputes between domestic servants and their masters. *Kitchen v. Shaw.* 791

#### II. Actions against.

A magistrate who does a wrongful act, (as in person unjustifiably arresting an individual,) but who really believes that he has a right to do the act in his capacity of justice of the peace, is entitled to notice of action. If he had reasonable grounds for what he did, he is justified in law. *Wedge v. Berkeley.* 665

### LANDLORD AND TENANT.

#### I. Yearly Tenancy created by Distress, and Receipt of Rent.

*A.* granted an annuity to *B.* out of certain lands, with the usual powers of distress and entry, if the annuity should fall into arrear. *A.* afterwards granted a lease for years to the defendant. The annuity having fallen into arrear, *B.* distrains on the defendant, and informed him that he had a charge upon the premises under lease to him; the defendant thereupon signed an agreement to "attorn and become tenant to *B.*," and paid him rent:—Held, that this created a new tenancy from year to year between *B.* and the defendant, determinable on the payment of the arrears of the annuity,

upon which the defendant's lease for years would revive. *Doe v. Boulter.* 650

#### II. Creation of Tenancy by parol Demise.

See LEASE.

### LEASE.

#### I. Whether an Instrument be an Agreement or a Lease.

1. An instrument cannot operate as a lease, if it appear on the face of it that the supposed lessor has not the power, at the time of executing the agreement, to grant a lease. *Hayward v. Haswell.* 411

#### II. Terms of Parol Lease.

1. In December 1819 the testator's father was tenant of a farm belonging to the plaintiff, till the following Lady-day. The plaintiff's steward in the month of December proposed to let the farm, and read from a printed paper the terms of letting. The testator was present, and assented to those terms, agreeing to succeed his father at Lady-day, but no writing was signed. He did then enter and continued tenant till his death, since which the defendants (his executors,) occupied and paid rent. At the foot of the printed paper of terms was written a memorandum, not signed by either party, but by the attorney of the plaintiff, who was present at the time of letting. This memorandum commenced in the following terms: "*A. B.*, as agent of the plaintiff, agreed to let, and *C. D.* agreed to take," and went on to state the farm-rent and when payable, that the term was for one year certain from Lady-day next, and so from year to year, until a due notice to quit was given. It was held that this agreement, followed by entry and payment of rent, created a

tenancy upon the terms contained in the printed paper and memorandum, and that they might be referred to by the attorney (the witness) as shewing what the terms of the demise were. *Lord Bolton v. Tomlin.* 247

### LIMITATIONS, STATUTES OF.

The Court will grant a mandamus to compel the payment of money raised under 22 Geo. 3, c. 83, (*Gilbert's Act*) although thirty years had elapsed, and no demand been made. *The King v. The Churchwardens of Bighton.* 774  
See STATUTES.

### LONDON.

#### *Power over Newgate Gaol.*

The Gaol Act (4 Geo. 4, c. 64, s. 13,) which provides that all the powers given by that act to justices at quarter sessions shall be exercised, so far as regards the prisons in the city of London, by the Court of Mayor and Aldermen, does not enable the latter to prevent the Middlesex magistrates from committing prisoners to the gaol of Newgate, which is the county gaol of Middlesex. *The King v. Cope.* 515

### MANDAMUS.

#### *I. Where it lies.*

1. Two circumstances must concur to authorize the issuing of a mandamus—a specific legal right and the absence of an effectual remedy. *The King v. Nottingham Old Waterworks Company.* 480
2. If it be doubtful whether there be a remedy, the Court will issue a mandamus. *Ibid.*
3. Where a mandamus has issued in pursuance of a compensation clause in a local act, to impanel a jury and to assess the damages sustained by the party, the Court, upon the

discussion of a rule nisi for a mandamus to enforce the payment of the damages assessed, will not allow the legality of the first mandamus to be questioned. *The King v. Nottingham Old Waterworks Company.* 480

4. In such a case the regularity of all proceedings previously to and at the trial is to be presumed, no objection having been made at the time of the trial. *Ibid.*
5. If the Lords of the Treasury have made an order on the town council of a municipal corporation for compensation, which is not obeyed, the Court will enforce it by mandamus. *The King v. The Mayor of Bridgewater.* 466
6. The Court will grant a mandamus to the parish officers to pay the principal and interest of a sum borrowed under *Gilbert's Act*, (22 Geo. 3, c. 83,) although the money had been borrowed thirty years, and no demand been made. *The King v. The Churchwardens of Bighton.* 775

#### *To make a Poor's Rate.*

7. A mandamus will issue to compel one of the churchwardens and one of the overseers to concur in making a rate for the relief of the poor, where they refuse to consent, unless the rate expressly stated that certain inclosures are within a particular district of the parish. *The King v. The Churchwardens and Overseers of the Poor of Edlaston.* 20

#### *To make a Church Rate.*

8. *James I.* granted a rectory to a corporation in trust to pay stipends and to bear all the charges issuing out of the rectory. The 22 & 23 Car. 2, absolved the parishioners from the payment of tithes, and enacted that a rate should be made yearly by parish officers for the payment of stipends and for church

repairs. The 56 Geo. 3, c. 1v, enacted that it might be lawful for the wardens, overseers, and inhabitants in vestry to make a rate, (to a large amount) for the amount of stipends and church repairs. On a vestry refusing to make a rate for the above purposes under the last-mentioned act, the Court issued a mandamus to them to call a vestry and make a rate. *The King v. Wardens, &c. of St. Saviour's, Southwark.* 496

*To Justices to issue a Warrant.*

9. By a local act, persons who refused to pay the rate were to be summoned before a magistrate, and if they then refused, the magistrate was authorized and required to grant a distress warrant to levy the amount. A tithe owner having refused to pay the rate, on the ground that tithes were not rateable under the act, the magistrate refused to grant a distress warrant, but the Court of King's Bench issued a mandamus to the magistrate to compel him so to do. *The King v. The Justices of Bucks.* 503

*To deposit Accounts.*

10. The Court of King's Bench will issue a mandamus to a treasurer of a county, to deposit with the clerk of the peace, in pursuance of 12 Geo. 2, c. 29, books containing entries of the county expenditure, although the receipts, tradesmens' bills, the gaoler's accounts, and copies of the county rate, had been already deposited with the clerk of the peace, and the books contain the discharges of the treasurer and the discharges of the former treasurer by the justices in sessions. *The King v. Payn.* 524
11. The trustees appointed under local acts of parliament for building a church, &c., and authorized to levy rates upon the inhabitants of

the parish, whose accounts were directed to be audited and allowed by the quarter sessions, are nevertheless compellable, under s. 34 of the Vestry Act (1 & 2 W. 4, c. 68) to produce their accounts for the last half year before the auditors of the parish accounts, appointed under and in consequence of the adoption by the parish of the last-mentioned act. *The King v. The Church Trustees of St. Pancras.* 507

*To produce Documents.*

12. Pending an appeal at sessions against a removal on a settlement by service, under an unstamped assignment, indorsed on indentures of apprenticeship, the overseers of the respondent township applied for a mandamus to the overseers of the appellant township, to produce the assignment to be stamped, this Court refused the writ. *The King v. The Overseers of Westowe.* 222

*To Assessors to insert Names in Burgess Roll.*

13. Where the names of certain burgesses duly qualified in other respects, were objected to and expunged from the burgess lists by the mayor and assessors on revision, on account of the non-payment of the shilling required by 2 W. 4, c. 45, s. 56, the Court of King's Bench considered that they had not the power to grant a mandamus to insert the names. *The King v. The Mayor of Hythe.* 239

*II. When a Mandamus does not lie.*

See QUO WARRANTO, I. 1.—SESSIONS, IV. 1.

2. Where an office is full by the appointment of the person who *primâ facie* has the right of appointment, and where there are means of trying the title by action, this Court will not grant a man-



damus against the party filling the office in order to try the title. *The King v. The Minister and Churchwardens of Stoke Damerel.* 56

3. The commissioners of customs refused to deliver up certain tobacco claimed as wrecked goods, and upon which a duty of 5*l.* per cent. had been tendered, and the Court refused to grant a mandamus to compel them to do so, as there was another remedy. *The King v. The Commissioners of the Customs.* 536
4. A mandamus will not in such a case be issued, because it would be issuing a mandamus to the king; per *Littledale J.* *Ibid.*
5. A decree by the Lord Chancellor in 1741, had declared the right of voting to be in the inhabitants only paying rates and assessments, and the usage since that decree had been in accordance with it: an election having been made by such inhabitants, at which the votes of non-rated inhabitants were tendered and refused, the Court refused to grant a mandamus for a new election, as the parties applying for it had made out no case to shew that the term "inhabitants" used in the charter had a wider signification. *The King v. Governors of Sandford.* 328

### III. Form of.

1. Where the mandamus recited, that it was the duty of the trustees, who had been required so to do, to produce accounts (in the terms of 1 & 2 *W.* 4, c. 60, s. 35,) and that they had refused so to do, and then ordered them to produce the accounts which they were ordered to keep by the local acts:—Held, that the mandamus was bad in ordering more than was warranted, either by the grievance recited or by the General Vestry Act. *The King v. The Church Trustees of St. Pancras.* 507
2. Where the writ was obtained on

an affidavit stating that a rate was necessary for the relief of the poor, and the mandamus recited that no rate had been made for the necessary relief of the poor, and that the overseers had refused to make a rate:—Held, that the writ contained upon the face of it sufficient to give the Court jurisdiction. *Rex v. Gadsby.* 572

### IV. Practice.

1. The Court will make a rule for a mandamus absolute, although the affidavits on which the rule nisi was obtained contain misrepresentation and suppression of facts, if sufficient remains unanswered to warrant the Court in issuing the writ. *The King v. Payn.* 524
2. Although the return made to a mandamus may be in the nature of a demurrer, the counsel for the crown are entitled to begin. *The King v. The Church Trustees of St. Pancras.* 507
3. The rule for a mandamus to concur in making a rate for the relief of the poor, is absolute in the first instance. *The King v. The Churchwardens, &c. of Edlaston.* 20
4. A writ of mandamus to the overseers and churchwardens of a parish to make a poors' rate may be issued out on the prosecution of one of the overseers, where it appeared by affidavit that the other overseer had refused to concur in making the rate, and the 1 *W.* 4, c. 21, s. 56, makes no difference as to the parties who may obtain the writ. *Rex v. Gadsby,* 572

### MISNOMER.

1. Assignment and acceptance of a parish apprentice in the following words, "the said *T. M.* doth hereby assign the said *Elizabeth Matthews* (the apprentice named in the indenture), and the said *M. P.* doth hereby agree to accept the said *Elizabeth Melhuish*:"—Held, that

the misnomer did not render the acceptance a nullity. *The King v. Inhabitants of Exminster.* 603

**MARSHALL.**

See PRISONER.

**MEMORANDA, 575.**

**MIDDLESEX.**

Power of Middlesex magistrates to commit to Newgate.

See LONDON.

**MISDIRECTION.**

*Of Judge at Trial.*

Counsel need not insist on the case being left to the jury if the judge think fit to nonsuit. *Law v. Wilkins.* 697

**MONEY HAD AND RECEIVED.**

See ASSUMPSIT, I. 2.

**NEW RULES.**

**I. Construction of New Rules.**

1. The rules of Hil. 4 W. 4, made by virtue of 3 & 4 W. 4, c. 42, are to be construed in the same manner as an act of parliament. *Bastard v. Smith and others.* 242

**II. Allowance of several Pleas.**

4. Two pleas to an action of trespass quare clausum fregit, the one justifying under a custom for all tinnars to make trenches in lands for conveying water for the better working of a stannary, and the other alleging the custom to be upon making compensation for the injury done, cannot be pleaded together, being within the rule of H. T. 4 Will. 4. *Bastard v. Smith* 242

**III. Under non assumpsit.**

1. In an action of assumpsit against carriers for the loss of a parcel above

the value of 10*l.*, the defendants cannot give in evidence under non assumpsit the defence given them by the Carriers' Act, that the value of the article had not been declared at the time of delivery. *Syms v. Chaplin and others.* 129

**IV. Under Not Guilty.**

1. Privileged communication is a defence that may be set up in an action for defamation under the plea of not guilty, notwithstanding the R. G. of H. T. 4 W. 4, IV. 1, *Lillie v. Price.* 16

**V. Under Nunquam Indebitatus.**

1. In debt on simple contract for an attorney's bill in conducting a suit, to which payment and nunquam indebitatus ultra was pleaded, evidence is admissible, since the rule of H. T. 4 W. 4, II. 3, to show that it was agreed that the suit should be prosecuted for the money actually disbursed. *Jones v. Read.* 18
2. Nor is this evidence excluded by the payment of money into Court. *Ibid.*

**VI. Costs of First Trial when Second Trial granted under R. Hil. 2 W. 4, s. 64. See COSTS, V. 1.**

**NEWSPAPER.**

See CRIMINAL INFORMATION.

**NEW TRIAL.**

Costs of. See COSTS, V.

**NOLLE PROSEQUI.**

The effect of entering a nolle prosequi to one of the counts of the declaration on a plea pleaded to the whole. *Wright v. Acres.* 761  
See PLEADING, III.

**NONSUIT.**

Duty of counsel if judge thinks fit to nonsuit. See MISDIRECTION.

## NOT GUILTY.

Effect of plea of, under the New Rules, in an action for libel. See **NEW RULES**, IV.

## NOTICE.

Of action to justices. See **JUSTICES**, II.  
Of an assignment of a parish apprentice. See **POOR**, III. 3.

Of appeal. See **APPEAL**, III.—**RATE**, I. 1, 2.

To quit. See **EJECTMENT**.

Where a clause in a local act enabled the commissioners to sue or to be sued for or concerning any thing done by virtue or in pursuance of the act in the name of their clerk, and a subsequent clause provided, that no action should be commenced against any person for any thing done in pursuance of this act until fourteen days' notice had been given to the clerk of the commissioners:—Held, that an action against the clerk for the non-payment of an annuity granted in pursuance of the act was maintainable, notwithstanding the latter clause applied to mis-feazances or malfeazances only. *Cane v. Chapman*.

104

## NUISANCE.

*What amounts to a Nuisance.*

The defendants, who were the owners of the soil adjoining a harbour, were indicted for a nuisance, in erecting planks in it; a special verdict was found, but it did not distinctly appear by the verdict whether the erection was in the harbour or not. The verdict found, that "by the defendants' works, the harbour is in some extreme cases rendered less secure." Assuming the erection to have been in the harbour, it was held, that consequences so slight, resulting from the acts of the defendants, did not amount to a nuisance. *The King v. Tindal*.

719

## NUNQUAM INDEBITATUS.

Plea of, what may be given in evidence under. See **NEW RULES**, V.

## OFFICE.

What is, under the Municipal Corporation Act. See **COMPENSATION**, I. 1, 2.

Settlement by serving. See **POOR**, III. 9.

## ORDER OF REMOVAL.

Of children within the age of nurture. See **POOR**, IV. 1, 2.

## OVERSEER.

*Election of*. See **ELECTION—MANDAMUS**, III. 2. IV. 4.

## OUTLAWRY.

On a motion to reverse an outlawry after final judgment, the Court will *not* impose, as one of the terms upon which they will grant the motion, that the defendant should pay interest from the time of signing final judgment to the period of reversal. *Ibbotson and another v. Fenton*.

779

## PARISH CLERK.

*Appointment of*.

*Quære*, whether by the canon it is necessary that the appointment of a parish clerk should be signified to the parishioners. *Rez v. Inhabitants of Bobbing*.

166

See **POOR**, III. 9.

## PARISH.

See **POOR LAW COMMISSIONERS**.

Creditors who have advanced money to a parish under the 22 *Geo. 3*, c. 83, (*Gilbert's Act*), are not bound to apply annually for one-twentieth of their principal money, under 43 *Geo. 3*, c. 110, and therefore the Court will grant a man-

damus to the parish officers to pay the principal and interest, although the money had been borrowed thirty years previously, and no instalment of the principal had ever been demanded. *The King v. The Churchwardens and Overseers of Bighton.* 774

### PARSON.

*Differences between Parson and Curate.*

The 57 Geo. 3, c. 99, s. 53, enacts, that any difference arising between any rector and his curate touching the stipend or allowance appointed to such curate under the provisions of the act, or the payment or arrears thereof, shall be summarily determined by the bishop; and s. 74 enacts, that no other jurisdiction, except that of the bishop, shall be exercised in any case where the jurisdiction is given him by this act:—Held, in an action by curate against rector for arrears of salary; 1st, that these provisions of the statute were properly pleaded in bar, and not to the jurisdiction; 2d, that it was not necessary to state in the plea the nature of the differences which arose. *West v. Turner.* 612

### PATENT.

*Specification too large.*

1. Where the specification of letters-patent claimed as an "invention the application of a self-adjusting leverage to the back and seat of a chair, whereby the weight on the seat acts as a counterbalance to the pressure against the back," and it appeared that *A.*, previously to the letters-patent, had made and sold chairs in which the same principle was applied, but which could not be called into action without the use of additional machinery:—Held, that the patent could not be supported, as it claimed too

much, and would have prevented *A.* from making the chairs he had made formerly. *Minter v. Mower.* 595

2. *Semble*, that a patent for an improvement of *A.*'s chair would have been valid. *Ibid.*

### PAYMENT OF MONEY INTO COURT.

What it admits. See EVIDENCE, I.

### PLEADING.

#### I. Declaration.

*Incomplete Statement of Cause of Action.*

1. In case for a malicious arrest, the declaration is bad after verdict on motion in arrest of judgment, for stating that the defendant "wrongfully and injuriously," procured the writ to issue, and caused the plaintiff to be arrested, without the addition of the word "maliciously." *Saxon v. Castle and Browne.* 661
2. Where a clause in a local act authorized the commissioners to grant an annuity to any person advancing money for the purposes of the act: *Semble*, that a declaration in an action on the case against the commissioners for not paying the annuity, is bad on special demurrer, if the plaintiff do not allege that the money was advanced for the purpose of the act. *Cane v. Chapman.* 104
3. In an action on the case for obstructing plaintiff in the enjoyment of an easement, the plaintiff must shew in his declaration that the obstruction was in the place or thing wherein the plaintiff is entitled. Thus, where a declaration alleged a right to take water at a cistern, and complained that the defendant wrongfully locked up a door leading to it, and thereby prevented the plaintiff from using

the cistern, issue having been taken on the right to take water, judgment was arrested after verdict for the plaintiff, because, non constat that he had any right to go through the doorway in question, although the verdict found he had a right to take the water. *Tebbutt v. Selby.* 710

4. In an action on the case for selling goods which had been replevied, the declaration ought to contain an averment that the defendant knew that the goods had been replevied. *Mounsey v. Dawson.* 763

## II. Plea.

1. *Plea in Bar.* See PARSON.
2. *Plea, compounded of Law and Facts.*
  1. An allegation in a plea to a count on a bill of exchange, that the plaintiffs were a banking company, consisting of more than six persons, and that they were illegally associated together, under 3 & 4 Will. 4, c. 98, is compounded of law and fact, and therefore traversable. *Ransford v. Copeland.* 671

## *Issue of Law only.*

2. The plea to an action of assumption against the defendant as acceptor of several bills of exchange, stated, that after the accepting of the bills, and after the time of payment, the defendant being resident in Scotland, in consideration that certain of his creditors should forbear to sue, made his deed, by which deed, stamped and attested according to the law of Scotland, he the defendant assigned his personal property in Scotland for the benefit of his creditors; that notice of the deed was given to the plaintiff, and that by his writing signed by him, and which writing was by the law of Scotland valid and effectual in that behalf, he did nominate R. H. as the attorney of him the plaintiff, and as such at-

torney authorized him to concur in and adopt the deed, and to receive the dividends. The plea then stated that R. H. had adopted the deed and attended meetings of the creditors; that divers other creditors of the defendant had accepted the assignment in satisfaction of their debts; that the causes of action arose before the execution of the deed, and that sufficient money had become available under the deed to pay all the creditors; and that all and singular the proceedings aforesaid were pursuant to and in conformity with the law of Scotland, whereby and by reason of the said several premises, and by effect of the aforesaid laws, the defendant hath become absolutely discharged from the causes of action. Replication, that the defendant hath not become nor is discharged modo et formâ:—Held, that by this plea the law of Scotland was put in issue. Secondly, that the plea did not disclose a defence by the law of England, as it did not appear that the plaintiff had executed the deed, or induced any other creditors so to do, or in any way precluded himself from suing on the original debt. *Woodham v. Edwards.* 207

3. Case against the clerk to the commissioners for paving and lighting the town of H. The declaration alleged, that after the passing of a local act the plaintiff paid to the commissioners a sum of money, and thereupon by a grant made according to the form of the statute, five commissioners, by virtue of the act, in consideration of 1850*l.* paid to them by the plaintiff, did grant to the plaintiff an annuity of 140*l.* out of the rates to arise by virtue of the act, to be paid quarterly; that a quarterly payment was due; that the commissioners had money in their hands arising from the rates, and were

requested to pay, and it thereupon became their duty to pay; concluding with a breach complaining of non-payment. The plea, which traversed that it was not the duty of the commissioners to pay, was held bad on special demurrer, as it tendered a mere issue of law. *Cane v. Chapman.* 104

### III. Effect of Plea to the Declaration after Nolle Prosequi to one Count.

1. A declaration in an action of assumpsit contained two counts, the former for 10*l.* for instruction, the latter for 10*l.* on an account stated; damages were laid at 20*l.* The defendant pleaded, 1st, non assumpsit; 2dly, payment of 10*l.* in satisfaction of the promises and of the damages sustained by the non-performance thereof. The plaintiff, before the trial, entered a nolle prosequi to the second count. At the trial, the defendant had a verdict on the plea of payment. It was held, that the record must be looked at at the time of trial, and not when the pleas were pleaded, and that therefore the plaintiff was not entitled to judgment non obstante verdicto, on the ground that the plea pleaded a smaller sum in satisfaction of a larger. *Wright v. Acres.* 761

### IV. Pleading in particular Actions.

1. Case for disturbance of an easement. See EASEMENT.
2. *Semble*, if the right in the occupier of an ancient messuage to take water at a pond were a profit a prendre, that the allegation that the water was to be for the more convenient use of the messuage, is a sufficient limitation of the right claimed on general demurrer. *Manning v. Wasdale.* 172

### POLICY.

See INSURANCE.

### POOR.

- I. Poors' rate. See RATE, III.
- II. Maintenance of poor. See MANDAMUS, I. 7. III. 2. IV. 4.

### III. Settlement of.

#### By Apprenticeship.

1. If service by an apprentice with a second master can in other respects be construed to be a good service under the indentures with the first master, it is immaterial whether the second master knew the fact of the apprenticeship or not. *The King v. Inhabitants of Sandhurst.* 296
2. A settlement may be gained by apprenticeship under indentures made in Newfoundland, the pauper being of full age at the time of binding himself. *The King v. Inhabitants of Clossworth.* 437
3. When a parish apprentice is bound into another parish by assignment of the indenture of apprenticeship, notice from the churchwardens and overseers of the first parish to those of the second is not requisite under 56 G. 3, c. 139, s. 2. *The King v. Inhabitants of Exminster.* 603

#### By renting a Tenement.

4. A granary forming an entire floor, having no internal communication with the rest of the building, and only to be entered by a ladder from the ground, is not a separate and distinct building within the meaning of 59 G. 3, c. 50, so as to confer a settlement. *The King v. Inhabitants of Henley upon Thames.* 445
5. To gain a settlement under the 1 W. 4, c. 18, the whole of the subject-matter of the renting must be occupied. It is not sufficient if part, to the annual value of 10*l.*, is occupied. Thus, *A.* hired two cottages, being separate and distinct dwelling-houses, but adjoining to

each other and under one continuous roof, together with three acres of land, for a year from Lady-day 1832, at the rent of 14*l.* a year. At Lady-day *A.* entered upon one of the cottages and the land, and occupied the same under the hiring till Lady-day 1833. The other cottage he underlet to *S.* at a rent of 4*l.* and *S.* occupied it till Lady-day 1833, and paid *A.* rent for it. *A.* paid the whole rents, 14*l.*, to the landlord. The cottage and land occupied by *A.* were worth more than 10*l.* a year:—Held, that *A.* did not gain a settlement by this hiring and occupation of one of the cottages and land. *The King v. Inhabitants of Berkswell.* 432

*By Hiring and Service.*

6. *L.* agreed, on behalf of his son, that he should serve *M.* from the date of the agreement until a certain specified time, *M.* paying at the expiration of the said term five pounds to the son. *L.* to find his son clothes, washing, and all other necessaries, and *M.* meat, drink, and lodging:—Held, this was a contract of hiring and not of apprenticeship. *The King v. Inhabitants of Billingham.* 149
7. Where a pauper was hired in the parish of *A.* in June 1833, at a monthly hiring, and served under that hiring till the following Michaelmas, and then was hired on a yearly hiring till Michaelmas 1834, under which she served:—Held, that her contract of hiring and service was not completed at the time of the passing of the 4 & 5 *W.* 4, c. 76, (Aug. 14, 1834,) so as to gain a settlement in *A.* *The King v. Churchwardens and Overseers of Rettenden.* 448

*By the Payment of Rates.*

8. A settlement may be gained by the

payment of parochial rates for a tenement not occupied according to the 1 *W.* 4, c. 18, if the occupation satisfies the provisions of the 6 *G.* 4, c. 57. *The King v. Churchwardens and Overseers of Stoke Damerel.* 453

*By Serving an Office.*

9. A pauper was appointed parish clerk by the rector of the parish, in the following manner:—The rector sent for the pauper on a Sunday and requested him to perform duty on that day, and on coming out of the desk the rector said to the pauper, "I shall appoint you my regular clerk and sexton, and to follow me in funerals and marriages:—Held, that this was a proper appointment of the pauper as parish clerk, and that he gained a settlement by serving the office. *The King v. Inhabitants of Bobbing.* 166

IV. *Removal of Poor.*

1. The children (within the age of nurture) of a wife married to a second husband cannot be removed by an order of justices with the husband, although the 4 & 5 *W.* 4, c. 76, s. 57, enacts, that such children shall for the purposes of the act be deemed a part of such husband's family. *The King v. Inhabitants of Walthamstow.* 460
2. An order of removal for removing a father and his children, which omits to state either the names or ages of the children, is not necessarily void, as the children may neither have been baptized nor acquired a name by reputation. Per Coleridge, J. *The King v. Inhabitants of Withernwick.* 423

POOR LAW COMMISSIONERS.

*Power to make Unions.*

The poor law commissioners have no powers under the 39th section

of 4 & 5 Will. 4, c. 76, (the Poor Law Amendment Act,) to make an order for the election of a board of guardians in a parish where the administration of the poor laws is already in the hands of a board of directors under a local act. *Williams, J. dissentiente. The King v. Poor Law Commissioners.* 371

### POOR'S RATE.

See RATE, III.—MANDAMUS, I. 7,  
III. 2, IV. 4.

### PORT.

See NUISANCE.

### POSSESSION, ADVERSE.

See ADVERSE POSSESSION.

### PRACTICE.

#### I. Amendment.

1. The Court or a judge have power, at any stage of the proceedings, to amend an issue, &c. not made up in compliance with the forms given in the R. Hil. T. 4 W. 4, therefore where the nisi prius record did not contain the date of the writ of summons:—Held, that the judge might supply the omission. *Cox v. Painter.* 581

2. See AMENDMENT.

#### II. Arrest.

1. An affidavit of debt made by the manager of a joint stock bank in the following form:—"J. H. manager of the Ripon branch of the Yorkshire bank, maketh oath and saith, that A. N. is justly and truly indebted unto J. S., as one of the registered public officers of the Yorkshire bank, in 50*l.* for money lent by this deponent, as such manager as aforesaid, is irregular," in not shewing that the manager was authorized to lend the money, but it is not void. *Spencer v. Newton.* 823

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2. An affidavit to hold to bail, which states that the defendant is indebted to the plaintiff in 500*l.* for principal monies due upon a bill of exchange, without stating the sum for which the bill was drawn, is bad. *Fowell v. Petre.* 227

### III. Waiver.

1. Arrest was made in London fourteen days before the end of Hilary term, on an irregular affidavit to hold to bail. The prisoner made no application to be discharged out of custody on this ground, till three days after term:—Held, that the application was too late, there being reason to suppose that the irregularity had come to the notice of the prisoner during the course of the term. *Spencer v. Newton.* 823

2. An application to set aside process for a defect in the affidavit to hold to bail must be made within a reasonable time. Nineteen days from the time of arrest was held an unreasonable time. *Fowell v. Petre.* 227

3. An award published nine days before the end of Hilary term directed the defendant to pay the plaintiff a certain sum of money, and the plaintiff to lay out a certain sum of money on the premises which the defendant held as lessee of the plaintiff:—Held, that the defendant had not waived any objections that might be taken to the award, by not giving notice to the plaintiff of his intention to apply to the Court after he had heard that plaintiff had commenced the repairs, nor by the defendant's attorney requesting a week's time to pay the money, which the plaintiff granted, on conditions that the defendant appeared to have assented to. *Hayward v. Phillips.* 288

### IV. Particulars of Demand.

1. In actions against the Marshal of



the King's Bench Prison for an escape, the plaintiff is bound to give a particular of the escape relied upon, and the judge's order for a particular should require the precise day of the escape to be stated, which the plaintiff must state in his particular if it is within his knowledge. *Davis v. Chapman.* 699

#### V. Security for Costs.

1. A foreign sovereign residing abroad, who is plaintiff in an action, must give security for costs. *The Emperor of Brazil v. Robinson.* 817

#### VI. Delivery of Declaration to a Prisoner.

1. Appearing as an attorney before a judge for a prisoner in custody on a *capias ad respondendum*, does not constitute him attorney in the suit, so as to entitle the plaintiff to leave the declaration at his office. *Spencer v. Newton.* 823

#### VII. Consolidation of Actions.

See INSURANCE.

#### VIII. Criminal Proceedings.

See CRIMINAL INFORMATION—JURY.

#### IX. In Ecclesiastical Proceedings.

See ECCLESIASTICAL COURT—PROHIBITION.

#### PRINCIPAL AND AGENT.

See ESTOPPEL, 1.

##### *What constitutes Agency.*

1. Where the plaintiff gave a parcel directed to *F.* in London, to the carrier at *B.*, who drove a mail cart between *B.* and *M.*, and the carrier booked it at *M.*, at an inn where the defendant's coach stopped to take in parcels, and received the carriage for it from the innkeeper who was in the habit of booking par-

cels for the defendant's coach, and who did book this parcel to London, and delivered it to the coachman of the defendant's:—Held, that the carrier was the agent of the plaintiff, and the innkeeper the servant of the defendant, and therefore that the plaintiff might recover damages from the postmaster for the loss of the parcel. *Syms v. Chaplin and others.* 129

2. The plaintiff bought a quantity of hemp by auction, at the rooms of the defendants, who were brokers in Liverpool. The defendants delivered an invoice in their own names as sellers. On payment being made by the plaintiff, the defendants gave him an order on *C.* and *D.* for the goods, which on presentation was refused, and the plaintiff could not obtain delivery of the goods:—Held, that the defendants were bound by the representation in the invoice, and could not offer evidence to shew that they sold as agents for *C.* and *D.*, and that the plaintiff knew *C.* and *D.* to be the principals at the time of the sale by auction. *Jones v. Littledale.* 677

#### PRIVILEGED COMMUNICATION.

See DEFAMATION, 1, 2.

#### PRISONER.

See PRACTICE, VI.

The Marshal cannot of his own authority grant the rules to a prisoner in custody for contempt, in not putting in an answer. If such a person be desirous of indulgence on account of ill health or otherwise, he must make a special application to the Court. *In re Gompertz.* 618

#### PROFIT A PRENDRE.

See EASEMENT.

PROHIBITION.

*Where it lies.*

1. Prohibition lies to the Consistory Court, if it proceeds to hear exceptions at the suit of a legatee, to an inventory exhibited by an executrix. *Griffiths v. Anthony.* 72
2. Where in a suit in an Ecclesiastical Court, the libel contained several articles, some of which comprised articles conusable at common law, but which were not objected to by the defendant during the progress of the suit, and the Court in their sentence found that the articles were for the most part proved, and did not particularize in respect of which articles the sentence was pronounced, a prohibition does not lie. *Hart v. Marsh.* 62
3. If the prohibition had been applied for before sentence pronounced, such of the articles only would be removed as contained matter conusable at the common law. *Per Patteson, J.* *Ibid.*

QUARTER SESSIONS.

See SESSIONS.

QUO WARRANTO.

*I. Where it lies.*

1. If a party has been ousted of an office by the election of another person to that office (the election not being merely colourable), his remedy is not by mandamus, but by an information in the nature of a quo warranto. *The King v. The Mayor, &c. of Oxford.* 474
2. The Court will grant leave to a private relator to exhibit an information in the nature of a quo warranto against individual members of a corporation, although the affidavits on which the rule is moved disclose matter tending to dissolve the corporation. *The King v. White.* 84

3. To entitle a party to an information in the nature of a quo warranto, on the ground that the person filling the office has not been elected by a majority of the class entitled to vote, the relator must shew who the class are that are entitled to vote, and that another person had a majority of such votes. *The King v. Mashiter.* 314
4. Thus where a charter of *Edw. 4* granted to the tenants and inhabitants of the manor of H. (which was of ancient demesne) that the justice of the peace for the manor should be chosen by the said tenants and inhabitants:—Held, that a relator who claimed to be elected by a majority of the inhabitants (without giving any construction to the word "inhabitant"), had not made out a *prima facie* case to entitle him to the writ. *Ibid.*

*II. Where it does not lie.*

1. A quo warranto information does not lie for exercising the office of a poor law guardian under the New Poor Law Act. *The King v. Carpenter.* 773
2. The Court refused a rule nisi for a quo warranto information against the town clerk of a borough, which was moved for in order to contest his right to compensation as a displaced officer, under the 5 & 6 *Will. 4*, c. 76, s. 66. *The King v. Harris.* 576
3. *Quære*, whether an information in the nature of a quo warranto will lie for the usurpation of the office of sexton. *Rex v. Minister and Churchwardens of Stoke Damerel.* 56

RAILWAY ACT.

*For Construction of a Clause giving Costs.*

See COSTS, III.

## RATE.

I. *Borough Rate, appeal against.*

1. A notice of appeal against a borough rate under the Municipal Corporation Act (5 & 6 Will. 4, c. 76,) must state a grievance, or facts from which a grievance must be necessarily inferred. *The King v. The Recorder of Poole.* 756
2. A notice in the following form was held insufficient:—"I, F. T., being a Burgess of the borough of P., and called upon to pay the rate or assessment hereinafter mentioned, do hereby give you and each and every of you notice, that I intend to appeal and shall appeal at the next general quarter sessions of the peace to be holden, &c. against a borough rate, at a meeting of the council of the said borough, held on &c., ordered and resolved to be raised for payment of the expenses to be incurred in carrying into effect the provisions of the Municipal Act. Dated, &c. *Ibid.*

II. *County Rate—Right to inspect.*

1. The rate-payers of a county have, neither at the common law nor by statute, any right to inspect and copy the bills of charges of county officers, when they are deposited with the clerk of the peace among the county records, in pursuance of the 12 Geo. 2, c. 29, s. 8. The right of inspection is confined to the justices of the peace for the county. *The King v. The Justices of Staffordshire.* 260

III. *Poors' Rate, Liability to.*

1. Where a local act empowered the trustees therein named to raise a sum of money for rebuilding a parish church, and to make a rate for defraying the principal and interest of the sum borrowed on the "houses, warehouses, shops, buildings, lands, tenements, and here-

ditaments, rated or rateable to the poor:"—Held, that tithes were rateable under these words. *The King v. Justices of Buckinghamshire.* 503

2. Before the passing of a statute in 1817 (57 Geo. 3), the freemen of the city of York, who were occupiers of the houses in Monk's Ward, were entitled to the right of stray over Heworth Moor, of which certain persons in the act named were seised in fee. By the act Commissioners were empowered to extinguish the right of stray, &c., to assign a portion of the moor, in lieu thereof, to the mayor and commonalty of the city of York, free of all manorial rights, to be exclusively enjoyed by such freemen of the city as were before entitled to the right of stray, and in the same manner as the right of stray was enjoyed. The Commissioners by their award (16th January, 1822), set out to the mayor and commonalty 117 acres, 3 roods, and 20 perches. At the wardmote of the mayor and aldermen, certain officers, called pasture masters, are appointed, who are subject to other officers, called wardens, of whom the lord mayor was always one, the others being three of the aldermen. The pasture masters regulated the enjoyment of the stray, and directed the repairs of bridges and gates, and appointed a herdsman and the wages of the herdsman, and all other necessary expenses were paid by means of annual sums paid by each freeman for each head of cattle depastured. The pasture masters rendered an account to the wardens. The freemen of Monk's Ward, since the acts and the inclosures, have had the exclusive enjoyment of the land in question, subject to the regulations of the wardens and pasture masters. The mayor and

commonalty received no money on account of the stray, nor turned any cattle thereon, nor derived any benefit in their corporate capacity, nor in any other manner, except as any of them might be entitled as freemen of Monk's Ward. During several years subsequently to the passing of the act, large expenses were incurred by the pasture masters in the necessary annual expenses in maintaining and improving the same, and for the purpose of raising funds, the wardens and pasture masters let portions of the allotted lands, and received about 2000*l.* In 1826, the pasture masters having a large balance in hand, laid out 498*l.* in the purchase of five acres of old inclosed land. In 1826 this land was conveyed by lease and release to the wardens and pasture masters and their heirs, as trustees for the freemen, and for their exclusive enjoyment. The five acres were accordingly added to and now form part of Monk's Ward Stray; 279*l.* was also expended by the pasture masters in building a cottage for the herdsman. In auditing the accounts of the pasture masters by the wardens the balance has generally been in their favour, though in two or three years, on account of the extraordinary expenses, it was not, but in either case it has always been carried forward to the account of the succeeding year. The land would let for 250*l.* a-year, and about 200 head of cattle were turned on:—Held, that the mayor and commonalty were to be considered in the occupation of the whole of the land, except the five acres, and for those they were not rateable. *The King v. The Mayor, &c. of York.* 539

3. Commissioners were appointed, under two local acts, for the purpose of paving, lighting, &c. the

streets of the town of Beverley.—They have power to erect or purchase gas apparatus, and if they should erect or purchase such apparatus, they are authorized, after sufficiently lighting the streets, to let out or grant gas to private individuals, upon such terms, and at such rents, as they shall think proper; provided, nevertheless, that all money arising therefrom be applied, in the first instance, to defray the expense of the apparatus, &c.; and if there be any surplus, the same shall be applied generally for the purposes of the acts. The Commissioners are also authorized to levy rates for the purposes of the act. In pursuance of these acts, the Commissioners purchased gas works within the parish of M., of J. M., who had been previously rated to the relief of the poor, as proprietor and occupier of those gas works, and have continued to manufacture gas there to supply the streets, and to let out gas to private consumers, applying the money thus obtained as prescribed by the act. The Commissioners are not rateable to the relief of the poor as proprietors or occupiers of gas works. *The King v. Commissioners of Beverley Gas Works.* 646

4. The 51st section of the General Turnpike Act (3 Geo. 4. c. 126), which exempts all persons from assessments to the poor's rate, in respect of tolls or toll houses, applies to the trustees of the tolls of a road made under a local act, although they are beneficially interested in the receipt of the tolls, and although some of the provisions of the local act are inconsistent with the general act. *The King v. Trustees of Great Dover Street Road.* 157

#### IV. Grounds of Appeal against a Rate.

1. By a local act the guardians of

- the poor of the parish of B. were directed to value all houses, lands, tenements, and hereditaments within the said parish, for the purpose of rating to the relief of the poor. By the customary mode of rating under this act, fixed machinery erected for the purposes of manufacture was not rated, nor were buildings containing it rated according to their value, as increased by that machinery. A gas company supplying the town of B. with gas, but having their gas manufactory out of the parish, were rated "for their gasholders and premises in O. street, and mains and pipes within the parish of B." The company had no property in the soil of the streets, under which their mains and pipes were laid, but a mere licence from the commissioners for paving and lighting the town in whom that property was vested. The gasholder was valued, for the purpose of the rate, as a warehouse or building, at what it was worth to let by the year. The mains and pipes, and the land they occupy, were valued by ascertaining the quantity of land through which they are laid, and valuing that land with reference to the value of the adjoining lands, taking into consideration the purpose for which it was used. The mains and pipes were also valued separately at an annual rental, to let in the same manner as houses, with an allowance for wear and tear:—Held, that such a rate is bad for inequality, on the ground of omission to rate other property of a similar nature. *The King v. Birmingham and Staffordshire Gas Light Company.* 691
2. The simple fact of being left out of a poor's rate, where no improper motives are shewn for making the omission, is no ground for an appeal against a rate. *The King v. George.* 451

### V. Church Rate.

1. When the Court will grant a mandamus to make a church rate. 575  
See MANDAMUS, I. 8.

## REGULA GENERALIS, 1.

### REPUTATION.

See EVIDENCE, IV.

### REPLEVIN.

*Right to grant.*

Where the lord of a franchise has the prescriptive right to grant replevins in the same manner as the sheriff had before the statute of Marlbridge, the sheriff has no concurrent jurisdiction with him. *Mounsey v. Dawson.* 763

### RULES.

See NEW RULES.

### SESSIONS.

See APPEAL, IV.—POOR.

#### I. Jurisdiction of.

1. Where no statement of the grounds of an appeal against an order of removal has been delivered to the overseers of the respondent parish, the Sessions have jurisdiction to respite the appeal. *The King v. Inhabitants of Kimbolton.* 606
2. Although an order of removal contains on the face of it defects, either of form or substance, those defects cannot be taken advantage of on appeal, unless the notice of the grounds of appeal states them. *The King v. Withernwick.* 423

#### II. Statement of the Grounds of Appeal.

See APPEAL, IV. 1, 2, 3, 4, 5, 6.

#### III. Finding of Sessions.

1. The Court of Quarter Sessions having refused to allow the appellants to enter on their case a

statement of the ground of appeal, that "the pauper had gained a settlement by hiring and service in a third parish," without any further specification, and confirmed the order of removal, on the ground of its insufficiency, a mandamus will not issue commanding them to enter continuances and hear the appeal. *The King v. Justices of Derbyshire.* 703

2. Where the question on appeal respecting the settlement of a pauper is, whether he occupied a tenement in the character of a servant, and the sessions find he occupied as a servant, and state the facts for the consideration of the Court of King's Bench, the finding will not be set aside unless it appears necessarily wrong. *The King v. Inhabitants of Snape.* 429
3. A verbal contract of hiring is a question for the determination of the sessions. *The King v. Inhabitants of Billingham.* 149
4. A written contract of hiring is a question of law upon which the Court of Quarter Sessions may take the opinion of the Court of King's Bench. *Ibid.*

#### IV. *Where a Case is granted.*

1. When the Court of Quarter Sessions dismiss an appeal subject to a case, this Court will not grant a mandamus to enter continuances and hear the appeal. *The King v. Justices of Suffolk.* 306
2. Where a case sent by the Court of Quarter Sessions for the opinion of the Court of King's Bench, stated that on the trial of an appeal respecting the settlement of a pauper, the respondents proposed to give in evidence conversations between the parties to a written agreement before and at the time of signing the instrument, but the case did not state what those conversations were, but it did distinctly state as a question for the opinion of the

Court, whether the agreement was a contract of hiring, the Court of King's Bench refused to send the case to be restated. *Rez v. Inhabitants of Billingham.* 149

#### V. *Power to amend.*

1. *Quære*, whether the omission in an order of removal, of the statement of both the names and the age of children removed with their father, is such a defect as the sessions have the power to permit to be amended. *The King v. Inhabitants of Withernwick.* 423

### SETTLEMENT.

See APPEAL, IV.—POOR.—SESSIONS.

### SEXTON.

See QUO WARRANTO, II. 3.

### SHERIFF.

#### I. *Duties of.*

As to his concurrent right to grant replevins within the jurisdiction of the lord of a franchise.

See REPLEVIN.

#### II. *Liabilities of.*

1. Where a plaintiff appoints his own bailiff to execute a writ, the sheriff is relieved from all responsibility until the party is arrested and delivered into the actual custody of the sheriff. *Ford v. Leche.* 737
2. The sheriff received a cap. ad resp. against D., at the suit of R. Two days afterwards he received from F. an alias capias also against D., at the suit of F. F. wrote the following letter to the undersheriff:—"Myself v. D. I enclose you a writ herein, and shall feel obliged by your granting a warrant hereon, directed to Mr. M. and Mr. B. I shall write to Mr. B. in a day or two." The sheriff issued a warrant to Mr. M., on the writ at the suit of R., who arrested D. on that warrant, took a bail-bond from him, and then allowed

him to go at large. It was held, that the letter was an appointment by *F.* of *Mr. M.* and *Mr. B.* to be his special bailiffs; that the sheriff was not therefore liable to an action for an escape: and that although the actual arrest in the one action was a constructive arrest in the other, yet that the sheriff was not liable, as the agency of *Mr. B.* and *Mr. M.* to the plaintiff did not cease when the arrest was made. *Ford v. Leche.* 737

### SLANDER.

See DEFAMATION.

### SPECIAL CASE.

When the Court of Quarter Sessions have granted a case, the King's Bench will not grant a mandamus to enter continuances and hear the appeal. *The King v. The Justices of Suffolk.* 306

*Presumption in favour of the Finding of Session.*

See SESSIONS, III. 1, 2.

### STAMP.

*What is sufficient.*

A lease which demised a dwelling-house and land at a rent certain, and then demised two fields from the succeeding Michaelmas at the same rent which the lessor received from the persons who then occupied them, does not require, on account of the latter demise, a stamp of 1*l.* 5*s.* It is sufficient if such an ad valorem stamp is affixed as will cover the whole amount of rent to be paid. *Parry v. Deere.* 47

### STATUTE.

See CONSTRUCTION.

The disqualification of a bankrupt as a councillor under Municipal Corporation Act.

See CORPORATION.

Power of assignee of bankrupt to

acquire estate mortgaged by him, under 6 *Geo.* 4, c. 16.

See EQUITY OF REDEMPTION.

What is an agreement under the Statute of Frauds.

See FRAUDS, STATUTE OF.

Liability of turnpike trustees under 3 *Geo.* 4, c. 126, to poor's rate.

See RATE, III. 4.

Power of Middlesex magistrates to commit to Newgate under the 4 *Geo.* 4, c. 64.

See LONDON.

Estate created by the allotment of the commissioners of an inclosure act.

See INCLOSURE.

Power of justices to determine disputes between domestic servants and their masters, under 6 *Geo.* 3, c. 25.

See JUSTICES, I. 1.

Duty of churchwardens in paying off money raised for building churches, under a church building act.

See CHURCH, 1, 2, 3.

Duty of churchwardens in paying off money raised under Gilbert's Act, (22 *Geo.* 3, c. 83.)

See PARISH.

Costs under Railway Act.

See COSTS, I. 3.

### TRADE.

*Agreement in Restraint of.*

1. An agreement in partial restraint of trade is valid, if made upon good or valuable consideration. *Hitchcock v. Coker.* 796
2. A Court of Law will not consider the adequacy or extent of the consideration. *Ibid.*
3. It is no objection to such an agreement that a party is restrained from exercising his trade in a particular place for his life. *Ibid.*

### TRUSTEES.

Liability of trustee of turnpike tolls to poor's-rate.

See RATE, III. 4.

**TURNPIKE.**

The certiorari with respect to proceedings under the General Turnpike Act, 3 Geo. 4, c. 126, is not taken away by 3 Geo. 4, c. 95. *The King v. The Trustees of the Norwich and Watton Roads.* 32

**VENDOR AND PURCHASER.**

- I. *Evidence of Character in which Vendor acts.*

See PRINCIPAL AND AGENT, 2.

- II. *Acts of Vendor estopping him from setting up title in others jointly with the Purchaser.*

See ESTOPPEL, 1.

**VESTRY.**

- I. *Trustees of Local Acts authorized to levy Rates compellable to produce their Accounts under the Vestry Act, (1 & 2 W. 4, c. 60.)*

See MANDAMUS, I. 11.

- II. *Election of, under Local Act, or Custom.*

See ELECTION, I.

**WAGES.**

*Power of Justices to interfere in Disputes between Masters and Domestic Servants.*

See JUSTICES, 1.

**WAIVER.**

See PRACTICE, III.

**WARRANTY.**

*What Damages recoverable on Breach of.*

1. Declaration on breach of warranty of a horse, alleged, by way of special damage, that the plaintiff had resold the horse at an advanced price, that the horse had been returned to him, and that he had lost all the profit which he would have derived from the resale :—Held, that on this declaration the plaintiff could not recover the difference between the two prices, it not being averred that the increased value of the horse was owing to any outlay by him since it had been in his possession. *Clare v. Maynard.* 701
2. *Quære*, If it had been so averred and proved. *Ibid.*

**WILL.**

- I. *Construction of.*

See DEVISE.

- II. *Cancellation of.*

To cancel a will by burning, it is necessary that some part of the body of the will be burnt. A mere intent to burn, although the will is thrown by the testator upon the fire, is not sufficient. *Doe v. Harris.* 405



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